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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-581

MRS. CARNELL RUSS, et al.,

Petitioners,

VS.

CHARLES LEE RATLIFF, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MRS. CARNELL RUSS, et al.,

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vs.

CHARLES LEE RATLIFF, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners herein, Mrs. Carnell Russ and her several minor children, seek a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Eighth Circuit which partially reversed the judgment of the trial court herein (the United States District Court for the Eastern District of Arkansas, Pine Bluff Division), having partially vacated the verdict of the jury therein, and which otherwise affirmed the judgment of the District Court.

Opinions Below

The unreported judgment of the United States District Court for the Eastern District of Arkansas was entered with the Clerk of the Court on Monday, October 20, 1975 (See: Tr. at pages 839-840, Appendix A, *infra*). A Memo-

randum Opinion and Order, denying the Petitioners Motion for a Judgment Notwithstanding the Verdict or in the alternative a Motion for a New Trial, was entered on November 24, 1975. Said Memorandum and Opinion and Order is unreported and is found in Appendix B, *infra.*

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is found in Appendix C, *infra.* Said opinion was entered with the Clerk of the aforementioned Court on July 27, 1976.

An order denying the Petitioners request for a *Rehearing En Banc* was entered on August 18, 1976. It is unpublished and is found in Appendix D, *infra.*

Jurisdiction

The decision of the United States Court of Appeals for the Eighth Circuit is dated July 27, 1976. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the evidence at the close of the Petitioners' case in chief was sufficient to establish a prima facie case of liability for the wrongful death of Petitioners' decedent over and against the Respondent Mayor and the Respondent City Councilmen, under the theory of negligent entrustment, making the trial court's entry of a directed verdict in favor of the Respondent Mayor and the Respondent City Councilmen at the close of the Petitioners' case in chief and the affirmance thereof by the Circuit Court below reversible error.

2. Whether, in view of the holding of the Circuit Court below that, as a matter of law, Respondent Ratliff is liable

under the Civil Rights Act of 1866 (42 U.S.C. 1983) for the death of the Petitioners' decedent and that the jury's verdict otherwise cannot stand and in view of the fact that, without the jury's predicate finding of liability over and against Respondent Ratliff, said jury could not properly have found liability over and against Respondent Green, the Circuit Court below should have vacated the judgment in favor of Respondent Green and remanded the matter back to the trial Court for further consideration by a jury of the issue of his liability.

3. Whether the failure of the Court below to enter a judgment for the Petitioners over and against Respondent Ratliff as a matter of law, in view of its finding of liability over and against Respondent Ratliff as a matter of law, was unreasonable and inconsistent with the purpose of the federal rules to secure a just and inexpensive resolution of this case and controversy.

Statement of the Case

Carnell Russ, a 24-year old black man, was shot to death by a Star City, Arkansas, policeman, Charles Lee Ratliff, following Russ' arrest for speeding on Memorial Day afternoon, May 31, 1971. Russ' widow and children sought to recover damages for alleged violation of Russ' constitutional and civil rights pursuant to the Civil Rights Act of 1866 (42 U.S.C. §1983) and, relying upon pendent jurisdiction, the Arkansas Wrongful Death Act, Ark. Stat. Ann. §§27-906 *et seq.*

The Petitioners named as Defendants (Respondents herein) Star City policeman Charles Lee Ratliff; Jerry Green, an Arkansas State trooper who arrested the petitioners' decedent; Norman Draper, who was to start work-

ing as a Star City, Arkansas policeman the day after the shooting and was, on the day of the incident here in question, accompanying Respondent Ratliff for the purpose of familiarizing himself with police procedures; Lynn Thomasson, Mayor of Star City; and six others, all members of the City Council of the City of Star City, Arkansas. Only Officer Ratliff, State Trooper Green, and Draper witnessed the shooting incident.

The case was tried by a jury. At the close of Petitioners' case in chief, the District Court granted a partial directed verdict dismissing the claims against Respondents Draper, Mayor Thomasson, and the members of the City Council (See: Appendix A, *infra*). The suit continued as against Respondents Green and Ratliff but the jury denied any recovery over and against those individuals (See: Appendix A, *infra*). Following the adverse jury verdict, Petitioners unsuccessfully sought a new trial or judgment notwithstanding the verdict against Respondents Green and Ratliff (See: Appendix B, *infra*). Thereafter, Petitioners appealed from the judgment to the United States Court of Appeals for the Eighth Circuit, contending that the trial court erred in dismissing Respondents Draper and the City officials from the case and in denying to them a new trial or judgment notwithstanding the verdict as against Respondents Green and Ratliff.[1]

The United States Court of Appeals for the Eighth Circuit, in a decision handed down on July 26, 1976, affirmed the directed verdict over and against Respondents Draper, Thomasson and the members of the Star City, Arkansas City Council and affirmed the jury's action insofar as it exonerated Respondent Green; but it vacated the jury verdict insofar as it exonerated Respondent Ratliff and held that, in the face of the aggravated circumstances of the case and the total lack of justification for the Respondent Ratliff's actions, the jury verdict exonerating Respondent Ratliff could not stand, as a matter of law.[2]

[1] In addition, the Petitioners appealed the imposition of an expert witness' fee, relative to the appearance of the Arkansas Medical Examiner as a witness for the Petitioners in the trial of this matter.

Believing that the Circuit Court below committed several errors to the extent that it affirmed the judgment of the District Court, the Petitioners sought a rehearing *en banc;* but, in an Order dated August 18, 1976, the Court below denied the same (See: Appendix D, *infra*).

REASONS FOR GRANTING THE WRIT

I.

The Evidence at the Close of the Petitioners' Case in Chief Was Sufficient to Establish a *Prima Facie* Case of Liability for the Wrongful Death of Petitioners' Decedent Over and Against the Respondent Mayor and Respondent City Councilmen, Under the Theory of Negligent Entrustment, Making the Trial Court's Entry of a Directed Verdict in Favor of the Respondent Mayor and the Respondent City Councilmen at the Close of Petitioners' Case in Chief and the Affirmance Thereof by the Circuit Court Below Reversible Error.

The Petitioners postured their cause of action against the Respondent Mayor and the Respondent City Councilmen of the City of Star City, Arkansas, on the theory, among others, that, but for their negligence in hiring and training Respondent Charles Lee Ratliff, initially, and thereafter in retaining him as a Star City, Arkansas Po-

[2] See: Opinion of Circuit Court below at pages 11 and 12 thereof, Appendix C, *infra*.

liceman when they possessed or in a reasonable exercise of their duties should have possessed knowledge of his propensity for violence, he would not have been in this position as a Star City, Arkansas Policeman, on May 31, 1971, and he would not, then, have had the opportunity to effect the wrongful death of the Petitioners' decedent herein. More technically, the Petitioners' theory of liability over and against the Respondents Mayor and City Councilmen is encompassed within the doctrine of "negligent entrustment", a doctrine which has been applied both in noncivil rights, See: *Collins* v. *Arkansas Cement Co.,* 453 F. 2d 512 (8th Cir. 1972), and civil rights, See: *Marusa* v. *District of Columbia,* 484 F. 2d 828 (Ct. Appeals, D.C. 1973) and *Roberts* v. *Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *Affirmed and remanded for further consideration on the adequacy of the damage award,* 456 F. 2d 819 (5th Cir. 1971), *Cert. denied* 404 U.S. 866, 92 S. Ct. 83, 30 L. Ed. 2d 110 (1971), oriented litigation.

Unfortunately, at the time that the District Court entered its directed verdict in favor of the Respondent Mayor and Respondent City Councilmen (at the close of the Petitioners' case in chief) it did not consider the facts presented to it in the Petitioners' case in chief in the context of the legal doctrine of "negligent entrustment"; but rather it considered the same solely in the context of the legal doctrine of "respondent superior" as controlled by the Eighth Circuit Court of Appeals pronouncement in that respect in *Jennings* v. *Davis,* 476 F. 2d 1271 (8th Cir. 1973).

While the Circuit Court below correctly reviewed the directed verdict in the context of the "negligent entrustment" theory, it did so without the benefit of the District Court's evaluation of the evidence in that regard and/or a written opinion relative thereto. More importantly, in

reviewing the same, the Court below undertook to evaluate only part of the evidence presented to the trial Court in the Petitioners' case in main; and, then, it undertook to weigh the same in arriving at its judgment. As such, the Circuit Court below misapplied the standards which this Court has laid down as guidelines for a federal appellate court in its review of a trial court's entry of a directed verdict.

In *Gunning* v. *Cooley,* 281 U.S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720 (1930) this Court held:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. Texas & Pacific Ry. Co. v. Cox, 145 U.S. 593, 606, 12 S. Ct. 905, 36 L. Ed. 829; Gardner v. Michigan Central Railroad, 150 U.S. 349, 360, 14 S. Ct. 140, 37 L. Ed. 1107; Baltimore & Ohio R. R. Co. v. Groeger, 266 U.S. 521, 524, 527, 45 S. Ct. 169, 69 L. Ed. 419. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & Danville Railroad v. Powers, 149 U.S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642."

See also: *Coca Cola Bottling Company of Black Hills* v. *Hubbard,* 203 F.2d 859, 860-861 (8th Cir. 1953); *City of West Plains, Missouri* v. *Loomis,* 279 F.2d 564, 567-568

(8th Cir. 1960); and *Hanson* v. *Ford Motor Company,* 278 F. 2d 586, 597, at footnote 7 (8th Cir. 1960), then Circuit Judge (now Associate Justice) Blackmun writing the opinion.

More recently this Court, in addressing itself to the standards to be employed by a circuit court of appeals in reviewing a directed verdict against a plaintiff at the close of his or her case in chief, noted:

> "As Professor Moore has indicated, 'In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made. *On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.*' 5 Moore's Federal Practice 2316 2d ed, 1951. See Pawling v. United States (US) 4 Cranch 219, 2 L ed 601; Gunning v. Cooley, 281 US 90, 74 L ed 720, 50 S Ct 231; Tennant v. Peoria & P. U. R. Co., 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCANS 647. Cf. Smith v. Reinauer Oil Transport, Inc., 256 F2d 646, 649 (CA 1st Cir)." (Emphasis added).

See: *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777, 782 at footnote 6 (1962).

This expression of the boundaries of an appellate court in reviewing the trial court's entry of a directed verdict has been accepted, uniformly, as the prevailing rule of law. See: *Clark* v. *Universal Builders, Inc.,* 501 F. 2d 324 (7th Cir. 1974), *Cert. denied* 419 U.S. 1070, 95 S. Ct. 657, 42 L. Ed. 2d 666 (1974); *Canterbury* v. *Spence,* 464 F. 2d 772 (Court of Appeals, D.C. 1972); *Clyde* v. *Hodge,* 460

F. 2d 532 (3rd Cir. 1972); *Lindeman* v. *Textron, Inc.,* 229 F. 2d 273 (2nd Cir. 1956).

The prevailing rule of law has been the long standing view of the Circuit Court below as well. See: *Carter* v. *Kurn,* 127 F. 2d 415 (8th Cir. 1942), where Circuit Judge Gardner, in reversing and remanding a directed verdict for Defendants, explained:

> "In reviewing this question we must consider the evidence in the light most favorable to Plaintiff and resolve all conflicts in the evidence in his favor. He is also entitled to the benefit of such favorable inferences as may reasonably be drawn from the testimony. *Champlin Refining Co.* v. *Walker,* 8 Cir., 113 F. 2d 844; *Egan Chevrolet Co.* v. *Bruner,* 8 Cir., 102 F. 2d 373, 122 A.L.R. 987; *Johnson* v. *J.M. Yost Lbr. Co.,* 8 Cir., 117 F. 2d 53."

Id. at page 417. See also: *Chicago Great Western Railway Company* v. *Scovel,* 232 F.2d 952, 955 (8th Cir. 1956), *Cert. denied* 352 U.S. 835, 77 S. Ct. 53, 1 L.Ed.2d 54 (1956); *Thieman* v. *Johnson,* 257 F.2d 129, 130 (8th Cir. 1958); *Wilkins* v. *Kendle,* 287 F.2d 201, 202 (8th Cir. 1961); *Armco Steel Corp.* v. *Realty Investment Co.,* 273 F.2d 483, 485 (8th Cir. 1960).

Petitioners submit that, in affirming the trial Court's grant of a directed verdict in favor of the Respondent Mayor and the Respondent City Council members at the close of the Petitioners' case in chief, the Circuit Court below did not adhere to the applicable standards of review as enunciated by this Court or by the various Circuit Courts of Appeal including the Eighth Circuit Court of Appeals itself.

In asserting this position, it is necessary to reemphasize the fact that the trial court viewed the evidence at the

close of the Petitioners' case in chief and upon the motion by the Respondent Mayor and Respondent City Councilmen in the context of a theory of law not being asserted by the Petitioners (respondeat superior) rather than in the context of the doctrine of negligent entrustment under which the Petitioners sought to establish liability.

The elements of "negligent entrustment" are:

"(1) Proof that the entrustee was incompetent, inexperienced and reckless;

(2) that the entrustor knew or had reason to know of the entrustee's proclivities;

(3) that there was an entrustment of the chattel;

(4) that the entrustment created an appreciable risk of harm to the Plaintiff and a relational duty on the part of the Defendant;

(5) that the harm to the Plaintiff was 'proximately or legally caused by the negligence of the Defendant.'"

See: *Collins* v. *Arkansas Cement Co., supra* at page 514, citing Woods, *Negligent Entrustment: Evaluation of Frequently Overlooked Source of Additional Liability*, 20 Ark. L. Rev. & Bar Association Journal 101 (1966).

In substance, the Respondent Mayor and Respondent City Councilmen were being accused of the negligent entrustment of a deadly weapon in the hands of Respondent Ratliff by hiring him to and retaining him in the position of a Star City, Arkansas policeman, with the attendant authority in said position to utilize a deadly weapon in the performance of his duties merely because of his position as a law enforcement officer, when said Respondents possessed or should reasonably have possessed knowledge of Respondent Ratliff's proclivities toward violence, there-

by proximately causing the wrongful death of the Petitioners' decedent. At the time of the directed verdict in the trial court in favor of the Respondent Mayor and Respondent City Councilmen and against the Petitioners, the Petitioners had placed in evidence certain very important testimony and evidence which the Respondents should have been required to rebut and, thereafter, which a jury should have been permitted, by law, to evaluate and to make determinations thereon respecting the alleged negligence of the Respondent Mayor and Respondent City Councilmen for hiring Respondent Ratliff as a Star City, Arkansas policeman in the first instance; for subsequently failing to train him in the procedures of his job, generally, and in the use of a deadly weapon, specifically; and finally for retaining him in his position after learning of allegedly improper and brutal conduct on his part on other occasions and against other persons prior to the shooting death of Carnell Russ.

In that regard, the Petitioners placed into evidence testimony related to the absence or, at the very best, inadequacy of the background investigation of Respondent Ratliff by the Respondent City officials, See: Tr. at pages 350-360 where Appellee Thomasson testified in that respect (Appendix E, *infra*),[3] and their failure, after hiring him, to provide him with any training whatsoever in the proce-

[3] See also: Testimony of Respondent Ratliff who testified about his application and interview process (Tr. at pages 324-325, Appendix F, *infra*). Not insignificantly, prior to applying for a position with the Star City Police Department (which he ultimately secured), Respondent Ratliff had taken a civil service examination for the purposes of securing a position in the much larger and nearby Pine Bluff, Arkansas Police Department; but had never been called in that respect (See: Tr. at pages 322-323—Appendix F, *infra*). The Respondent Mayor testified that he was not even aware that Ratliff had applied for such a position (See: Tr. at page 357—Appendix E, *infra*), a manifestation of the less than adequate "check" done in this matter.

dures and process of law enforcement, generally, and gun use, specifically (See: Testimony of Respondent Ratliff at page 326—Appendix F, *infra*).

Moreover, the Petitioners presented evidence, through the testimony of at least two persons, that the Respondent Mayor and/or some of the Respondent City Councilmen had been made aware of allegedly improper and brutal conduct on the part of Respondent Ratliff against them, as individuals; their reporting of the same; and the failure of the Respondent City officials to take any action, whatsoever, to determine, at the very least, whether the allegations were accurate.[4]

Thus, Petitioners submit that, at the conclusion of their case in main, they had made out a prima facie case of negligent entrustment over and against the Respondent Mayor and City Councilmen since there was sufficient evidence in the record, for the jury to consider, on the

[4] See: Testimony of Bobby Lewis McGriff at pages 387-389 (Appendix G, *infra*). See also: Testimony of William Thomasson at pages 402-407 (Appendix G, *infra*). Both in substance testified to alleged brutality which they suffered at the hands of Respondent Ratliff prior to the shooting death incident, and their reporting of the same to Respondent Frizell (a Councilman) and Respondent Thomasson (the Mayor) respectively. In addition, the Petitioners called Marvin Thompson; and expected that he would have testified to the fact that he advised certain of the Respondents of the fear he had about Respondent Ratliff's conduct, as a Star City Policeman (to the effect that someone would be carried out of the jail feet first); but his testimony, as was anticipated, was not illicited during the course of his examination (See: Tr. at page 394 *et seq.*—Appendix G, *infra*). Thereafter, the Petitioners sought to impeach their witness (as is now allowed under the Federal Rules of Evidence) through the father of the deceased, Turner Russ, who testified that he was present at a time and place certain when said Marvin Thompson did indicate to those in attendance (including Mr. Russ) that he had advised City officials that if they did not take action, either Mr. Ratliff or someone else was going to be carried out of the jail feet first (See: Tr. at pages 497-498—Appendix G, *infra*).

issue of the negligence of the Respondent City officials for placing Respondent Ratliff in the position of a police officer and for retaining him in that position, notwithstanding that they knew or should reasonably have known his propensity for brutal conduct, such that Respondent Ratliff had the occasion and opportunity as a Star City, Arkansas law enforcement officer to commit the brutal, fatal and wrongful assault and battery upon Carnell Russ, deceased, in the Star City, Arkansas Jail; and that, accordingly, the case should not, then, have been taken from the jury without first giving the Respondents an opportunity to rebut the Petitioners' prima facie case in this regard.

While the law requires that the reviewing court consider *all* the evidence on the issue, not limiting itself to only certain evidence, in a light most favorable to and with all reasonable inferences in favor of the non-moving party, *Krivo Indus. Supply Co.* v. *National Distillers & Chemical* Corp., 483 F. 2d 1098 (5th Cir. 1973), *Rehearing denied* 490 F. 2d 916 (5th Cir. 1974), the Circuit Court below, when called upon to review the trial court's decision to grant the motion of the Respondent City officials for a directed verdict at the close of the Petitioners in chief, considered only the testimony of William Thomasson, ignoring completely and totally the testimony of one other main witness in the Petitioners' case in chief (Bobby Lewis McGriff), the testimony of an impeaching witness (Turner Russ), and the testimony and evidence in the Petitioners' case in chief related to the absence of an investigation by the Respondent City officials into the background of Respondent City police officer and the absence of training of Respondent Ratliff by said officials.

Moreover, in reviewing the grant of the directed verdict, the Circuit Court drew inferences from the testimony of William Thomasson to support the Respondents' (Movants') position rather than viewing all of the evidence

in the light most favorable to the Petitioners and giving to the Petitioners the benefit of such inferences which could reasonably be drawn from the testimony. See: *Carter* v. *Kurn, supra.*

Ignoring the testimony of Petitioners witness Bobby Lee McGriff as well as the testimony relative to the absence (inadequacy) of a background investigation and training, the Court below, in affirming the dismissal of the Respondent City Councilmen at the conclusion of the Petitioners case in chief, wrote:

> "The record is also bare of any evidence on which to attach liability to the city councilmen. No witness testified that any councilman acquired any specific knowledge of Ratliff's propensities for violence to and maltreatment of persons under arrest."

Then, in addressing itself to the propriety of the directed verdict in favor of the Respondent Mayor, the Circuit Court below noted:

> "We also agree with the district court that the plaintiff failed to make out a prima facie case against Mayor Thomasson. Only one witness testifying on behalf of the plaintiff said that he had complained to the mayor of Ratliff's brutality. One William Thomasson (apparently no relation to Mayor Thomasson) testified that Ratliff had arrested him for driving while intoxicated in February of 1971, and that, following the arrest, Ratliff drew his service pistol and struck him across the head three times. Mayor Thomasson learned of this alleged conduct while sitting in a judicial capacity trying William Thomasson on the DWI charges. At trial before Mayor Thomasson, Ratliff and William Thomasson weighed the credibility of the two witnesses and accepted Ratliff's version of

> the events. In light of subsequent events, Mayor Thomasson may have made an incorrect choice on credibility, but having decided to believe Ratliff rather than the arrestee, Thomasson, the Mayor cannot be said to have acquired knowledge, as alleged in the pleadings, that Ratliff had established a record and reputation for the propensity and tendencey of violence and maltreatment of prisoners arrested by him."

There can be absolutely no doubt but that the Respondent City Council members had knowledge through one of its members of the reputation of Respondent Ratliff (by and through Mr. McGriff's advisement of his concern respecting the officer to one of the City Councilmen members). It is submitted as well, that knowledge of one certainly can be imputed to the rest of the members as well as to the Mayor who sits on the Council. To say that, as a matter of law, each of the members, including the Mayor, must have specific, independent and corroborating knowledge is absolutely unreasonable. The jury should have been allowed to determine whether, based on the testimony of McGriff and Thomasson and coupled with the testimony of Respondent Ratliff himself about the procedure utilized by the City in hiring him (with the virtual absence of background check) and training him (with the virtual absence of the same), the Respondent City officials, in fact, had knowledge or should reasonably have had knowledge about Respondent Ratliff's proclivities for brutal conduct and whether they were otherwise negligent in entrusting Respondent Ratliff with a deadly weapon.

Not insignificantly, under the theory of "negligent entrustment", Arkansas law, and accordingly the controlling federal law herein, See: *Collins* v. *Arkansas Cement Co., supra,* requires that the claiming party prove that "the

entrustor know or *should have known* of the entrustee's condition or propensities". See: *Woods, supra* at page 107. This is to be contrasted with the law of other jurisdictions which requires *actual* knowledge. See: *Hines* v. *Bell,* 104 Ga. App. 76, 120 S.E. 2d 892 (1961); *R.J. Reynolds Tobacco Co.* v. *Newby,* 145 F. 2d 768 (9th Cir. 1944). As a matter of fact, former Chief Justice Harris of the Arkansas Supreme Court almost went so far as to hold that an employer has a duty to the public to learn the nature of the entrustee's propensities even if it did not have actual personal knowledge of the same. See: *Ark. La. Lumber Co.* v. *Causey,* 228 Ark. 1130, 312 S. W. 2d 909 (1958).[5] Such would seem to be a particularly appropriate standard for a public official charged with hiring law enforcement personnel who possess the power and authority to use deadly force.

Certainly the Petitioners herein presented sufficient factual evidence in their case in main for a jury to consider, upon proper instruction, whether the Respondent City officials had actual knowledge of Respondent Ratliff's proclivity toward a "quick draw" or whether, under the duty to the public, which officials who hire police officers must be held accountable to, the Respondents should have had knowledge of the same in the reasonable and prudent

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[5] Chief Judge Harris wrote in that regard:

"Mr. Ruchs (employer) was frequently in Emerson, and it would seem that any sort of investigation would have revealed the conviction (for drunk driving). However, we are not here concerned with whether an investigation by Ruchs would have revealed Doss's activity in driving the truck while intoxicated, nor are we even concerned with whether he should have made such investigation—for the testimony is positive to the effect that Ruchs was told by Blackwell of at least one occasion where Doss was operating the truck 'so drunk he didn't know what he was doing.'"

228 Ark. at page 1134. See also: *Rook* v. *Moseley,* 236 Ark. 290, 365 S.W. 2d 718 (1963).

exercise of their hiring powers, thus satisfying that important critical factor of knowledge under the doctrine of "negligent entrustment."

The Circuit Court's treatment of William Thomasson's testimony and its failure to consider the testimony of Bobby Lewis McGriff as well as the testimony related to the procedure utilized to hire Respondent Ratliff, with the absence of a reasonable background investigation attendant thereto,[6] and related to their failure to train him, on the issue of the liability of the Respondents Mayor and City Councilmen for the death of Carnell Russ, are clearly contrary to the standards to be applied in the appellate review of a trial court's directed verdict, as such standards have been enunciated by this and other courts.

In short, the Petitioners' made out a prima facie case of "negligent entrustment" over and against the Respondents Mayor and City Councilmen; and those Respondents should have been required to answer the same before the trial Court took any peremptory action herein. See: *Rodgers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 504, 77 S. Ct. 443, 447, 1 L. Ed. 2d 493, 498 (1957), *Rehearing denied* 353 U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957). See also: *Breeding* v. *Massey,* 378 F. 2d 171, 177 (8th Cir. 1967) and *Ray* v. *Mays,* 242 Ark. 111, 411 S.W. 2d 865 (1967) where, in each proceeding, the appellate courts up-

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[6] As a matter of fact it came out during the Petitioners' case in rebuttal that Respondent Ratliff had himself been arrested and convicted some years back of assaulting a police officer (See: Tr. at pages 723-725—Appendix H, *infra*). Such testimony obviously would have had incredible impact upon a jury if the Respondents Mayor and City Councilmen had not been prematurely dismissed without having been given the opportunity to rebut the Petitioners *prima facie* case; and said evidence would have reinforced that aspect of Petitioners case in main regarding the actual or constructive knowledge of the Respondents Mayor and City Councilmen relative to Respondent Ratliff's tendency toward violence.

held the trial courts' refusal to grant a directed verdict for Defendant on the "knowledge" issue and held, on contested evidence, that the testimony supported a jury verdict that the respective Defendants knew or should reasonably have known of the propensity for violence/incompetence in their entrustees.

In view of the foregoing, it is incumbent upon this Court to reverse the Circuit Court's affirmance of the trial Court's entry of a directed verdict in favor of the Respondent Mayor and Respondent City Council members at the close of the Petitioners' case in chief and to remand the matter back to the lower court for a jury trial on the appropriate factual issues.[7]

[7] It is submitted that the effect of dismissing the Respondents Mayor and City Councilmen from this action virtually assures the Petitioners' that, notwithstanding their success in securing a finding of liability for the wrongful death of Carnell Russ over and against Respondent Ratliff, they will not recover damages (since Respondent Ratliff, as opposed to the Respondents Mayor and City Councilmen, has little, if any assets). On the evidence submitted by the Petitioners it is unjust and error for the Court to have made that decision, as a matter of law, rather than the jury to have done so, as a matter of fact.

II.

In View of the Holding of the Circuit Court Below That, as a Matter of Law, Respondent Ratliff Is Liable Under the Civil Rights Act of 1866 (42 U.S.C. 1983) for the Death of the Petitioners' Decedent and That the Jury's Verdict Otherwise Cannot Stand and in View of the Fact That, Without the Jury's Predicate Finding of Liability Over and Against Respondent Ratliff, Said Jury Could Not Properly Have Found Liability Over and Against Respondent Green, the Circuit Court Below Should Have Vacated the Judgment in Favor of Respondent Green and Remanded the Matter Back to the Trial Court for Further Consideration by a Jury of the Issue of His Liability.

In view of the holding of the Circuit Court below that, as a matter of law, Respondent Ratliff is liable under the Civil Rights Act of 1866 (42 U.S.C. § 1983) for the death of the Petitioners' decedent and that the jury's verdict otherwise cannot stand and in view of the fact that, without the predicate finding of liability over and against Respondent Ratliff, said jury could not properly have found liability over and against Respondent Green, the Circuit Court below should have vacated the judgment in favor of Respondent Green and remanded the matter back to the trial court for further consideration by a jury of the issue of his liability.

Based on the fact that the jury found that Respondent Ratliff had committed no wrong, it would have been totally illogical and legally erroneous for the jury to have found that Respondent Green did, in fact and law, commit a wrong against the Petitioners' decedent; for the predicate to a finding of liability over and against all of the Respondents

was an initial finding by the jury that Respondent Ratliff committed a wrong. When the jury failed to do the latter, then its findings against the others were naturally, logically, and legally influenced and substantially colored thereby.

Thus once the Circuit Court below found that, as a matter of law, Respondent Ratliff was liable for the decedent's death and that, in effect, the jury should have been directed by the trial Court to find the same, it was required to review the jury's verdict relative to the liability of the other Respondents, particularly Respondent Green, in a different appellate context than it otherwise would have; and its failure to do so resulted in its illogical and legally erroneous decision insofar as it affirmed the jury's exoneration of Respondent Green.

In view of the instruction given herein by the trial Court to the jury (See: Transcript of the trial proceedings below at pages 811-812, Appendix I, *infra*), allowing the jury to find negligence from Respondent Green's refusal to tender the Petitioners' decedent a copy of the traffic ticket to which he was entitled (under Arkansas Statute 75-1008)[8] and in the context of the underlying predicate liability mandated over and against Respondent Ratliff by the Circuit Court below (notwithstanding the jury's verdict otherwise) a jury should now be permitted to consider the evidence, anew, relative to the issue of the liability of Respondent Green.

The Circuit Court below, in affirming the jury's initial exoneration of Respondent Green and the trial Court's subsequent refusal to set the same aside, merely addressed itself to the issue of whether or not Respondent Green had

[8] Said Statute is fully set forth in Note 3 of the Circuit Court's opinion below and is discussed at pages 3 and 4 thereof where the Court acknowledged that said statute had been violated by Respondent Green.

reasonable time within which to intercede once the altercation between Respondent Ratliff and the Petitioners' decedent commenced (See: the Circuit Court's discussion of the same at pages 12-18 of its opinion); and it held that, in view of the evidence before the jury, it was not unreasonable for the jury to have held that, notwithstanding Respondent Green's duty toward the Petitioners' decedent, he did not have reasonable time within which to intercede. However, in ruling as it did the Circuit Court below ignored the contention that, but for Respondent Green's negligence in refusing to give to the Petitioners' decedent a copy of the speeding ticket (as is required under Arkansas state law) the altercation and ultimate wrongful death would not have transpired. Furthermore it ignored the possibility that the reason that the jury exonerated Respondent Green, with respect to his duty to intercede, was merely because it failed to find the predicate liability against Respondent Ratliff.

Failure of the Circuit Court below to consider the aforementioned evidence (the failure of Respondent Green to give the Petitioners' decedent a copy of the ticket to which he was entitled) in the context of its holding and finding of liability against Respondent Ratliff (notwithstanding its consideration of the exoneration of Respondent Green based on the evidence related to the time factor and ability to intercede relative thereto), caused the Court to prematurely and unreasonably foreclose a jury from further consideration of the issue of liability of Respondent Green; and, as such, it is unjust and legally erroneous and must be reversed accordingly.

III.

The Failure of the Circuit Court Below to Enter a Judgment for the Petitioners Over and Against Respondent Ratliff as a Matter of Law, in View of Its Finding of Liability Over and Against Respondent Ratliff as a Matter of Law, Was Unreasonable and Is Inconsistent With the Purpose of the Federal Rules to Secure a Just and Inexpensive Resolution of This Case and Controversy.

Petitioners submit that the Motion made by their counsel for a directed verdict over and against Respondents Ratliff and Green as the jury retired to begin its deliberations was a timely and proper motion for directed verdict and was properly renewed by the Petitioners within ten (10) days after the entry of the jury verdict, by and through their motion for a judgment notwithstanding the verdict.

Petitioners motion for a directed verdict against Respondent Ratliff, made at the submission of the case to the jury rather than at the close of Respondent Ratliff's case in chief:

> "should not be read narrowly so as to penalize the client but rather should be read in the light of the purpose of the Federal Rules to secure the just speedy and inexpensive determination of every action."

Mosley v. *CIA. MAR. ADRA, S.A.*, 362 F. 2d 118, 122 (2nd Cir. 1966), *Cert. denied* 385 U.S. 933, 87 S. Ct. 292, 17 L. Ed. 2d 313 (1966). See also: *Markham* v. *Holt*, 369 F. 2d 940, 943 (5th Cir. 1966); *Hartley & Partner Inc.* v. *Florida Beverage Corp.*, 348 F. 2d 161, 163 (5th Cir. 1965); *Green* v. *American Tobacco Co.*, 391 F. 2d 97 (5th Cir. 1968); *Massachusetts Protective Association* v. *Mouber*, 110 F. 2d 203, 207 (8th Cir. 1940).

There no longer remains any doubt about the power of a federal appellate court to direct the entry of a judgment notwithstanding the verdict under proper circumstances. See: *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967). See also: *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 (1935); *Massachusetts Protective Association* v. *Mouber, supra* at page 207; *Green* v. *American Tobacco Company, supra* at page 105.

Inasmuch as this Court has emphatically stated that the Federal Rules of Civil Procedure are to be construed so as "to secure the just, speedy and inexpensive determination of every action," See: *Forman* v. *Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 225 (1962); See also: Moore, *Federal Practice and Procedure*, ¶52.11(3) at page 2689; *Markham* v. *Holt, supra* at page 943, and inasmuch as the Circuit Court below has held that, under the aggravated circumstances of the deadly and wrongful assault and battery herein, there is no way in which a jury can legally exonerate Respondent Ratliff from liability for the wrongful death resulting therefrom, it makes no sense whatsoever for the Circuit Court below to have reversed the judgment in that regard (setting aside the jury verdict) and to have remanded the matter back to the District Court for a new trial.

It is respectfully submitted that this Court should reject that action as inconsistent with the spirit of the federal rules as it has interpreted the same.

CONCLUSION

In view of the foregoing, Petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari in order to rectify the clear injustices which have resulted from the substantially erroneous decision of the Circuit Court below.

Respectfully submitted,

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Attorneys for Petitioners

By: /s/ NATHANIEL R. JONES

Certificate of Service

James I. Meyerson, Esq., one of the attorneys for the Petitioners herein, certifies that on the 22nd day of October, 1976, I did serve three (3) copies of the foregoing Petition for a Writ of Certiorari upon the attorneys for the Respondents and Respondent Ratliff, *pro se,* by mailing the same, postage prepaid, first class, as follows: Lewis Smith, Esq., Office of the Attorney General, State of Arkansas, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72201; Odell Carter, Esq., Post Office Box #598, Star City, Arkansas 71667; and Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

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Attorney for Petitioners

By: /s/ JAMES I. MEYERSON

APPENDIX

Appendix A

[829] The Court: Motion denied obviously.

Mr. Smith: Your Honor, in order to complete my record, I'd would now at the conclusion of all the evidence renew my motion stated at the end of the plaintiffs' evidence for a directed verdict.

Mr. Meyerson: We oppose the same, Your Honor.

Mr. Howard: Right.

The Court: Same ruling of the Court.

The Court will now be in recess pending the deliberation of the jury.

(Whereupon, at 6:04 p.m., recess is taken, and thereupon at 8:45 p.m., all parties present as heretofore, and the jury returning to the courtroom, the following proceedings, are had, to-wit:)

The Court: Mr. Foreman, has the jury reached —arrived at its verdict.

Mr. Foreman: We have arrived at a verdict, Your Honor.

The Court: You may hand it in.

The Clerk will read the verdict of the jury.

Clerk of the Court: We, the jury, find the issues in favor of the defendants, Charles Lee Ratliff, and Jerry Mac Green and against the plaintiffs, Mrs. Carnell Russ, individually, and as mother and [830] next friend of the minor children. Signed. Ronald Franzen, foreman.

The Court: Is this your verdict, Mr. Foreman and ladies and gentlemen of the jury, so say you all?

(All jurors indicated affirmatively).

The Court: Anything further gentlemen.

Appendix A

Mr. Howard: Nothing further Your Honor.
Mr. Smith: Nothing further.
Mr. Ratliff: Nothing further, Your Honor.

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[585] * * * tion of the risks. And, it said that with such justification in mind, the master—that is the employer—of course, is and can only be the municipality—and, in this case talking about Kansas City, Missouri—employing the appellees. It is the city who set the enterprise in motion, who profits from the appellees labor, and who if held liable, in such instances can by its power of taxation spend the resulting expenditures amongst the community at large—Kansas City, said the Circuit Court of Appeals, however is not a defendant in the action, nor could it be under Section 1983 referring the Supreme Court decisions in the matter. Likewise, Star City is not a defendant in the case, nor can it be under a Section 1983 case. And, as in the appellate procedures—since it is not a fact, that the City Council and the Mayor is shown to be a day-to-day supervisor, directing the action of the city policemen—in this case, Mr. Ratliff, and obviously not the State Patrolman. And, they were not there. They did not participate in the incident whatsoever; did not even know about it, were not in any way involved with the incident itself—they cannot be held [586] liable then under the allegations of the complaint. And, the Court is dismissing the complaint is to the Mayor and members of the City Council.

This means that the allegations of the complaint and the proof has made in the case as applicable

Appendix A

under the evidence here to the actions of the defendant, Charles Lee Ratliff, and the defendant, Jerry Mac Green—and, the case will continue now as to the allegations of the complaint as against these two defendants.

Now, the Court will submit to the jury at the proper time the applicable law in the case, as to the allegations in the complaint, and the burden of proof, and the duty and responsibility of the jury in accordance with the facts and the law in the case.

But, I will say to you at this time, you are not to assume that there is any inference, whatsoever, the fact that the Court has in its own responsibility taken this action with reference to the allegations of certain defendants—that consideration should be given because of that act, as to the remaining defendants in the case. You'll decide the case on the facts and the law

Appendix B

Memorandum Opinion and Order

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB 73-C-96

MRS. CARNELL RUSS, *et al.*,

Plaintiffs,

v.

CHARLES LEE RATLIFF, *et al.*,

Defendants.

This is a proceeding by the widow and heirs of the deceased, Carnell Russ, to recover damages arising out of his death in the Star City, Arkansas, jail. Mr. Russ was killed by a bullet discharged from a pistol held by defendant, Charles Lee Ratliff, who was then a police officer of the City of Star City. Defendant Jerry Mac Green, an Arkansas State Police officer, was present, having arrested Mr. Russ for speeding. Defendant, Norman Draper, was to become a police officer for the City of Star City the day following the shooting, and was also present at the time of the shooting.

Plaintiff alleged that the shooting was a violation of deceased's civil rights, and based jurisdiction upon Title 42 U.S.C. §1983 and Title 18 U.S.C. §1343. Plaintiff was also permitted to allege a pendent claim for wrongful death under Ark. Stats. Anno. §27-906, et seq.

Appendix B

After a trial which lasted a full week, the issues as to liability on the part of defendants Ratliff and Green were submitted to the jury, upon proper instructions as to the applicable law. The jury, upon due deliberation, returned in open court verdicts against the plaintiff, and in favor of the two defendants. Plaintiff made motions for directed verdict at the close of her case and at the conclusion of the evidence which motions were denied.

Plaintiff has now filed motion for judgment notwithstanding verdict or, in the alternative, for a new trial. The defendant Green has responded, defendant Ratliff, appearing pro se, has failed to respond within the permitted time.

The rules concerning consideration of motions for judgment notwithstanding verdict are well established: The evidence must be considered in the light most favorable to the party prevailing with the jury; it must be assumed that the jury resolved all conflicts in the evidence in favor of the prevailing party; all facts which the prevailing party's evidence tends to show must be assumed as proved; the prevailing party must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence; and the motion must be denied if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it. Minnesota Mutual Life Ins. Co. v. Wright, 312 F.2d 655 (8th Cir. 1963); Hanson v. Ford Motor Co., 278 F.2d 586 (8th Cir. 1960).

Reviewing the evidence adduced in the light of these standards, the Court is constrained to conclude that the motion for judgment notwithstanding the verdict should be denied.

The motion for new trial is addressed to the sound discretion of the trial court. Plaintiff contends that the Court should review the evidence and, should the Court's conclu-

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sions differ from those of the jury, grant a new trial. No errors in admission of evidence or in instructions are pointed out. Although the Court might have reached a different conclusion on the basis of the evidence, the Court cannot say that the verdict is so contrary to the weight of the evidence as to require that the solemn verdict of the jury be set aside, and a new trial granted. Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960).

The Court concludes that the case was as well presented as it is every likely to be, that there was no error of law, and that the jury was fairly and impartially selected. Upon the basis of the evidence, the Court finds that the doubtful issues of fact were decided by the jury, and that judgment should be entered in accordance with that verdict. The motion for new trial should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the motion of the plaintiff herein for judgment notwithstanding the verdict or, in the alternative, for a new trial, be and the same is hereby denied.

Dated: November 24, 1975.

(Signature illegible)
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 76-1007

MRS. CARNELL RUSS, ETC., *et al.*,
Appellants,

v.

CHARLES LEE RATLIFF, ETC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

Submitted: May 11, 1976.
Filed: July 27, 1976.

Before:

BRIGHT, STEPHENSON, and WEBSTER,
Circuit Judges.

BRIGHT, *Circuit Judge.*

Carnell Russ, a 24-year old black man, was shot to death by a Star City, Arkansas, policeman, Charles Lee Ratliff, following Russ' arrest for speeding on Memorial Day afternoon, May 31, 1971. Russ' widow and children (appellants) unsuccessfully sought to recover damages for alleged violation of Russ' civil rights pursuant to 42 U.S.C. §1983, and, relying upon pendent jurisdiction, under the Arkansas wrongful death act, Ark. Stat. Ann. §§27-906 *et seq.* The widow and children were denied recovery in district court and now bring this timely appeal. We affirm

in part and reverse in part, granting a new trial against appellee Ratliff.

Mrs. Russ[1] named as defendants Star City policeman Ratliff; Jerry Green, an Arkansas highway trooper who arrested Russ; Norman Draper, who was to start working as a Star City policeman the day after the shooting and was on the day of the incident here in question accompanying Ratliff for the purpose of familiarizing himself with police procedures; Lynn Thomasson, mayor of Star City; and six others, all members of the city council of Star City, Arkansas. Only Officer Ratliff, State Trooper Green, and Draper witnessed the shooting incident.

The case was tried to a jury. At the close of plaintiffs' case, the district court granted a partial directed verdict dismissing the claims against Draper, Mayor Thomasson, and the members of the city council. The suit continued against Green and Ratliff but the jury denied any recovery against those defendants. Following the adverse jury verdict, Mrs. Russ unsuccessfully sought a new trial or judgment n.o.v. against Green and Ratliff. Thereafter, she brought this appeal from the judgment, contending that the trial court erred in dismissing Draper and the city officials from the case and in denying her a new trial or judgment n.o.v. as against Green and Ratliff.

I. *The Factual Background.*

The parties do not dispute the essential background facts. Arkansas State Trooper Jerry Green arrested Russ for driving 75 miles per hour in a 60 m.p.h. zone about six miles outside of Star City. In the car with Russ were his

[1] While for convenience we refer only to Mrs. Russ' action, our rulings also apply to the claims of her children.

wife, six of his minor children, and another unrelated individual.

Trooper Green directed Russ to drive his car into Star City. In response to a radioed message from Trooper Green, Officer Ratliff, who was in a Star City police car accompanied by Draper, met Green and Russ at the courthouse in Star City.[2]

From this point forward, the testimony contains some discrepancies as to exactly what occurred. Because the primary claim is against Ratliff, we will state the facts most favorably to him, relying primarily upon his testimony. Where important, we will note conflicting testimony.

According to Ratliff, the radio call did not state and he did not know why he was asked to meet Green at the courthouse. Ratliff had left his "slapper" in the car as he normally did. He did not have mace because his spray can had become inoperable. Ratliff carried a six-shot revolver (a Magnum 357 Colt Trooper Three) with five rounds loaded and the hammer resting on an empty chamber. When Ratliff met Green at the courthouse, Green asked him to make arrangements for a bond for his prisoner, Russ. Russ, however, requested that he be released on his own recognizance. Although state law gave Green discretion to release Russ on the basis of his signature and a promise to appear in court, Green refused to release Russ.[3] Ratliff

[2] Ordinarily, the sheriff's office would process arrests made by a state trooper in the county, but in this case neither the sheriff nor his deputy was available to answer the radioed call.

[3] The relevant Arkansas statute provides:

> 75-1008. Arrested persons given 5 days' notice to appear in court—Where not immediately taken—Release upon written promise—Violations of officers.—(a) Whenever a person is arrested for any violation of this act punishable as a misdemeanor, and such person is not immediately taken before a

then spent some time on the telephone trying to contact the sheriff or his deputy to obtain authority to release Russ without bond but he was unsuccessful. During this period Russ also made one or more telephone calls, apparently attempting to locate his father. These calls were unsuccessful.

There is testimony that Russ then asked that he be allowed to post a personal check. This offer, too, was refused. Some testimony indicated that Ratliff lacked authority to accept such a check. Ratliff demanded $23 by way of a cash bond. Russ then went to his car and returned with money held in his clenched fist. Neither Ratliff nor Draper recalled seeing the money, however.

Russ then demanded that Green give him a copy of the ticket. Green told Russ that the receipt which Ratliff was prepared to provide was all that he needed and that the

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magistrate as hereinbefore required, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court.

(b) The time specified in said notice to appear must be at least 5 days after such arrest unless the person arrested shall demand an earlier hearing.

(c) The place specified in said notice to appear must be before a magistrate within the township or county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense.

(d) The arrested person in order to secure release, as provided in this section, must give his written promise so to appear in court by signing in duplicate the written notice prepared by the arresting officer. The original of said notice shall be retained by said officers and the copy thereof delivered to the person arrested. Thereupon, said officer shall forthwith release the person arrested from custody.

(e) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and shall be subject to removal from office. [Ark. Stat. Ann. §75-1008.]

ticket would be retained for the local court. Green's refusal to give Russ a copy of the ticket apparently violated state law. Ark. Stat. Ann. §75-1008(d). *See* note 3 *supra*.

When denied a copy of the ticket, Russ became angry and started to curse the officers. Ratliff asked Russ if he had money and was willing to post bond and accept the receipt. There is a dispute as to Russ' exact response,[4] but in any event, he refused to turn over his money without a copy of the ticket. Ratliff then informed Russ that he would have to enter a jail cell. Russ refused to enter the cell and, according to Ratliff, squared off in a fighting stance "dancing and prancing around like a boxer" and announced that "[a]ll three of you m.f.'s can't put me in there." Ratliff then took Russ by the elbow to lead him into the cell. Ratliff's version of the incident proceeds as follows:[5]

> I ducked the swing and knocked him back against the wall with my fist. • • • He [Russ] came off swinging again. • • • I knocked him back again [with my fist]. • • • He didn't fall. He's a big man. [Each blow knocked Russ back against the wall, a distance of about eight or ten feet.]
>
> He settled down like a fighter then. He quit his dancing and he started swinging then, I mean sure enough, haymakers. • • • I hit him a couple of times with my fist, maybe three or four, I don't know.

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[4] The witnesses disagree as to Russ' response to the question of whether he had obtained sufficient money from the occupants of the car. Ratliff testified that Russ "told me it was none of my business." Draper said that Russ responded "I've got a hell of a lot more than that." Green testified that Russ responded, "You'll get your money, baby," or "something to that effect."

[5] The order of the paragraphs has been altered to provide continuity.

Appendix C

Well, I let him swing, I don't know, maybe a dozen times and finally I decided Green had panicked or something, he just stood there froze and the boy was nearly hitting him, going by and coming by, and he never moved, so I didn't have a slapper and didn't have no gas and I wasn't paid to stand and fist fight nobody so I used my gun as a slapper. I hit him up side the head and knocked him to the office, all the way across it. He went through the door and hit the wall, across a space like this room, and he come back still [fighting]. [Ratliff hit him again with his gun.] There was a gun went off, I don't know whose it was.

The shot came from Ratliff's gun. It struck Russ between the eyes at a slight angle and inflicted a fatal wound.

Draper's testimony largely accords with that of Ratliff. He described the events after Russ refused to enter the cell as follows:

> So Officer Ratliff with his right hand reached up and got Mr. Russ by the left elbow to start to lead him toward the jail. Mr. Russ drew back, and got in a fighting stance—and drew back as if to strike Officer Ratliff. Officer Ratliff came up with his left hand and connected somewhere in the vicinity of his mouth with his fist.
>
> • • •
>
> Immediately as Ratliff grabbed—put his hand on Mr. Russ' elbow. Mr. Russ drew back and made a swing and Ratliff come around with his left hand, and hit him in the vicinity of the mouth. And, there was some—a couple, or three licks passed—maybe more I can't really say.

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> There was a scuffling going on, the touching of each other, and so forth. The next thing I knew—I did start at one time to step in and try to assist Ratliff. At that time he drawed his gun. And, he come out and made a swing, and hit Mr. Russ over the head somewhere in this vicinity. He fell back up against the frame of the doorway. The second time he swung again, he [Ratliff] was stretched away out—similar to that, and when the gun discharged Mr. Russ fell back against this petition [sic].
>
> • • •
>
> It was just a matter of a very few seconds. It wasn't a very long time. It was real short—period.

As did Draper, Trooper Green testified that the incident occurred in just a few seconds. Green further testified that

> • • • Mr. Ratliff reached to get [Russ] by the arm. • • • —Mr. Russ drawed back and squared off—like a fighter would do. And, I don't—I don't recall if he swung at Mr. Ratliff—or—I don't recall that. All I know is he squared off as if to fight. And, at that moment—from there I seen a gun come up, and— • • •
>
> Q. Did you see • • • any fist-blows?
>
> A. No, sir.
>
> I don't recall any—any fighting or—no licks. I don't recall other than just Mr. Russ squaring off. I don't recall any licks • • •.
>
> At this point in time—this gun. I seen this gun come up, and as it—as his [Ratliff's] arm extended the shot was fired.
>
> • • •

> From the time he squared off [until the time of the gunshot]—it was just a matter of—of seconds. • • • Possibly two seconds—three seconds. Just a short—just a short period.
>
> • • •
>
> Q. Did you have any opportunity to intervene in that altercation?
>
> A. No, sir. I did not.

Thus, Green testified that he saw no significant fisticuffs before Ratliff drew his weapon and shot Russ and that events occurred so rapidly that he had no opportunity to intervene.

The autopsy report indicated that Russ had been struck on the mouth and elsewhere on the head, supporting the testimony of Ratliff and Draper that Ratliff had struck Russ several times before the firing of the fatal shot.[6]

Several experts were called who testified that the fatal shot was fired from a distance of between 18 inches and four feet from Russ' head.

An accident reconstruction expert testified that he had conducted tests on a new gun of the same model as that carried by Ratliff.[7] This expert testified that because the design of the gun included an "interposing device" it would not discharge unless the trigger were pulled. He also testified that the gun had a "heavy" trigger and that he had

[6] It must be borne in mind that Draper and Green were both defendants charged, *inter alia*, with failure to intervene in the altercation. Draper had the defense that he was not an officer and had no duty towards Russ. Green's primary defense was that he did not have an opportunity to prevent Ratliff from shooting Russ.

[7] Ratliff's own gun was not available for testing because he sold it after the shooting. He could not provide the name of the purchaser.

not been able to "accidentally" pull the trigger by slinging the gun forward as if to hit someone with it. However, on cross-examination, he conceded that with use the trigger could become slightly easier to pull, although he said that the gun would never be a "hair trigger." He said that with such an older gun, it was conceivable, though not likely, that the trigger could be pulled inadvertently while it was being used as a slapper. The expert noted that because of the design of the gun, one's finger naturally tended to rest on the trigger when the gun was drawn. Ratliff testified that he normally placed only five shells in the cylinder and allowed the hammer to rest on the sixth empty chamber. The gun was so designed that when the trigger was pulled the cylinder would rotate to bring a live round into the chamber. It seems clear that the fatal shot resulted from the trigger actually having been pulled.

II. *The Case Against Ratliff.*

In accordance with prevailing law, the district court, in enunciating the rules of law for the jury (which for the purpose of this appeal have become the law of the case), instructed that Ratliff, having killed Russ, assumed the burden of justifying his act. The court further instructed that under state law Ratliff might "use such physical force as may have been necessary to enforce compliance by Carnell Russ with proper instructions and to protect other persons, including himself, from physical harm at the hands of Carnell Russ." The court further advised the jury that Ratliff would not be liable unless he "used more or greater force or means on the decedent, Carnell Russ, than would have appeared to a reasonable person, in like circumstances, to be necessary in order to accomplish the lawful purpose or purposes intended."

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Under any version of the incident,[8] the police officer, Ratliff, who struck Russ with a pistol and then shot him, whether accidentally or otherwise, must be held to have used excessive force upon his prisoner. Ratliff does not claim that he was in danger of personal harm from Russ' ineffectual swinging, if, indeed, any occurred. Before drawing the pistol and while using only his fists, Ratliff claims he had knocked Russ back against the wall on two occasions. Ratliff did not turn to Trooper Green and request assistance and there is no claim that Russ was seeking to escape.[9] Indeed, Ratliff's testimony demonstrates that he easily handled Russ' ineffectual alleged fisticuffs. Draper's testimony indicated he was available to assist Ratliff in subduing Russ. Ratliff, in addition to asking for personal assistance from Green or Draper, could have asked Green for his can of mace.[10] Ratliff's own testimony establishes that he was in complete control of Russ without drawing his weapon. Indeed, the only reason that Ratliff gave for drawing his weapon was because in Ratliff's words, "I wasn't paid to stand and fistfight nobody, so I used my gun as a slapper." Moreover, the evidence discloses that Ratliff handled the weapon in a ready-to-shoot position, with finger on the trigger.

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[8] In response to a motion for a new trial to review the record or judgment n.o.v., we review the record most favorably to the appellee.

[9] Ratliff contends that Green panicked and "just stood there froze."

[10] Ratliff testified that Trooper Green carried a can of mace that day although Green was not certain that it was on his person. In any event, there was mace in Green's car and the facts show no emergency which would have precluded Green from obtaining the mace.

Appendix C

We can find no evidence that Ratliff needed to draw his gun for his self-defense or to control the prisoner. Since no justification existed for Ratliff's use of a pistol against the prisoner, we cannot under the circumstances of this case allow the jury verdict to stand.

This court is mindful that a jury's verdict in cases of this kind ought not to be overturned without sound and good reason. Mrs. Russ is not entitled to judgment n.o.v. unless reasonable minds, viewing the evidence in the light most favorable to appellee Ratliff, could only have found in her favor. *Griggs* v. *Firestone Tire and Rubber Co.*, 513 F.2d 851 (8th Cir.), *cert. denied*, 96 S.Ct. 124 (1975). Yet, if the applicable section of the Civil Rights Act, 42 U.S.C. §1983, is to have any meaning[11] in the face of these aggravated circumstances, the jury's verdict exonerating Ratliff cannot be permitted to stand. Under similar and somewhat less aggravated circumstances, the courts have not been adverse to awarding damages against police officers who used excessive force against a prisoner either in firing a pistol or otherwise. *See Aldridge* v. *Mullins*, 474 F.2d 1189 (6th Cir. 1973); *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970); *Smartt* v. *Lusk*, 373 F. Supp. 102 (M.D. Tenn. 1972), *aff'd*, 492 F.2d 1244 (6th Cir. 1973); *cf. Jennings* v. *Davis*, 476 F.2d 1271 (8th Cir. 1973).

We recognize that Ratliff appeared *pro se* in the trial of this case in the district court. We note that the plaintiffs-

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[11] Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

appellants did not move for a directed verdict until after the trial court had already instructed the jury, and the motion then made sought a directed verdict against both Ratliff and Green. As we demonstrate below, the motion was clearly not well taken as against Green. Thus, the record does not clearly reflect Mrs. Russ made a proper motion justifying a directed verdict solely against Ratliff. Under all these circumstances, in reversing the case against Ratliff, we remand for a new trial on all issues, and reject Mrs. Russ' demand for judgment n.o.v.

III. *Other Issues.*

The evidence supports the jury verdict in favor of Green. Green testified that the entire incident lasted only a few seconds and that he was "stunned" at Ratliff's actions in drawing and firing the gun. Accordingly, the district court committed no error in refusing to disturb the jury verdict dismissing appellants' claims against Trooper Green.

The district court also properly dismissed the action against Draper. Draper was not yet a city policeman but retained the status of a private citizen. Thus, his conduct did not amount to state action. No basis existed for recovery under §1983. *See Monroe* v. *Pape,* 365 U.S. 167, 172 (1961). Even if pendent jurisdiction had attached, the record is barren of showing any unlawful or negligent conduct on Draper's part in the events leading up to the death of Russ. Although available on the scene, Draper assumed no duty to protect Russ from Ratliff.

The record is also bare of any evidence on which to attach liability to the city councilmen. No witness testified that any councilman acquired any specific knowledge of Ratliff's propensities for violence to and maltreatment of persons under arrest.

We also agree with the district court that the plaintiff failed to make out a prima facie case against Mayor Thomasson. Only one witness testifying on behalf of the plaintiff said that he had complained to the mayor of Ratliff's brutality. One William Thomasson (apparently no relation to Mayor Thomasson) testified that Ratliff had arrested him for driving while intoxicated in February of 1971, and that following the arrest, Ratliff drew his service pistol and struck him across the head three times. Mayor Thomasson learned of this alleged conduct while sitting in a judicial capacity trying William Thomasson on the DWI charges. At trial before Mayor Thomasson, Ratliff and William Thomasson told conflicting stories. Apparently Mayor Thomasson weighed the credibility of the two witnesses and accepted Ratliff's version of the events. In light of subsequent events, Mayor Thomasson may have made an incorrect choice on credibility, but having decided to believe Ratliff rather than the arrestee, Thomasson, the Mayor cannot be said to have acquired knowledge, as alleged in the pleadings, that Ratliff "had established a record and reputation for the propensity and tendency of violence and maltreatment of prisoners arrested by him * * *."

We do not suggest that under other circumstances a single notice to an appropriate city official charging a police officer with brutality may be ignored with impunity. Here, however, Mayor Thomasson received information of Ratliff's alleged brutality in judicial proceedings. Ratliff testified to the contrary. The mere assertion of the brutality charge, without corroboration, is not enough to impose liability upon Mayor Thomasson for Ratliff's unlawful act. *Cf., Chestnut* v. *Quincy,* 513 F.2d 91 (5th Cir. 1975); *Jennings* v. *Davis,* 476 F.2d 1271 (8th Cir. 1973).

Appendix C

Accordingly, we reverse and remand this case to the district court for a new trial against appellee Ratliff in conformity with this opinion.[12] Otherwise, the judgment stands affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[12] Appellants have also objected to the assessment of expert witness fees requested by the Arkansas State Medical Examiner. On review of the record, we are satisfied that the order requiring appellants to pay the fee of $122 rested within the trial court's discretion and we will not disturb it on appeal.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

76-1007—September Term, 1975

MRS. CARNELL RUSS, *et al.*,

Appellants,

vs.

CHARLES LEE RATLIFF, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 18, 1976

Appendix E

[350] * * * of Lynn Thomasson, a defendant, given on June 6th, 1974 in Pine Bluff, Arkansas.

(Mr. Meyerson read questions from deposition and Mr. Smith read the answers from the witness stand).

Mr. Meyerson: Mr. Thomasson was duly sworn by Sandra Smith—"Thereupon Lynn Thomasson, having been first duly sworn, was called for examination by counsel for the Plaintiffs, and testified as follows:"

Page three, line 19 through page eight, line 19.

Q. "Will you state your name—your full name, please? A. Lynn Thomasson.

Q. Where do you live, Mr. Thomasson? A. Star City.

Q. How long have you been a resident of Star City, Arkansas? A. Thirty-three years.

Q. What is your present occupation? A. I am Mayor. Retired from my other job.

Q. Before you retired—what was your business occupation? A. I was manager of C&L Electric Corporation.

Q. And, how long were you manager of C&L Electric? A. Thirty-four years.

Q. And, how long have you served as Mayor of Star City? A. Thirteen years.

Q. As Mayor of the town of Star City; what are your duties [351] and responsibilities relative to police work? A. Well, I think most Mayors and—of any small town are about the same. I'm a member of the City Council—preside over the City Council, and our Council operates—sort of, on a committee basis. We have a police committee; usually

we sort of go along with what the committee recommends. The committee functions in that respect, and that's sort of the way we handle it.

Q. Would you identify the members of the police committee? A. Now?

Q. Well, now and then, on May 31st, 1971? A. Well, now. Mr. Robert O. Trout is chairman; Mr. R. B. Robertson is a member, and W. V. Burns; isn't he Odell?

Mr. Carter: I believe that's right.

Q. I'm afraid—

By virtue of the fact that you are the mayor and the chief executive of Star City, you are an ex officio member of every committee of this city; is that correct? A. Right.

Q. So then you are a member of the police committee now and you were May 31st, 1971; is that correct? A. Yes.

Q. Directing your attention to May 31st, 1971, or going back to the first of the year of 1971—would you tell us what your policies were—either written or orally with [352] reference to the employment of police for Star City? A. We had no written policies. All of it is oral, and usually the committee—at least two of them—probably will get together and make the recommendation. That's about the way we carry out our policies.

Q. Would you be a part of this investigating committee? A. You mean as to investigating applicants and that kind of thing?

Q. Yes.

The Court: I believe it's interviewing applicants, Mr. Smith.

Mr. Smith: Excuse me. Rereading the answer:

A. "You mean as to interviewing applicants and that kind of thing?

Q. Yes? A. Yes.

Q. It is a policy; is that correct? A. Yes.

Q. What was the standard procedure? What did you do when you interviewed a prospective applicant or an applicant? A. He submit—rather, all applicants submit a written application on a special form that we use for this purpose. On this form they list their age; social security number, education, experience, references, and that sort of thing.

[353] Q. And, what is done with this form when it is filed with your— A. Beg your pardon?

Q. What is done with this form when it is signed by the applicant? A. It's in the city files.

Q. And, you maintain a permanent file on all applications? A. Yes.

Q. Is anything else done? I mean after the applicant files his application, and the committee reviews this application, what else is done as a matter of policy? A. Well, usually there is more than one. You have some two or three—I would guess in most cases or more than that—and then the committee usually recommends to the full council for employment—that sort of thing.

Q. Well, let me ask you this parenthetically. Star City is what class of city in Arkansas? A. Second class.

Q. If you are second class, so you would have more than twenty-five hundred people? A. About twenty-two hundred.

Q. And, you are positive that you are classified as a second class city under the laws of the State of Arkansas; is that correct? A. Yes.

[354] Q. Do you have what is generally referred to as a civil service commission? A. No.

Q. You don't have one? A. No.

Q. You've never had one; is that correct? A. Yes—no. That is correct.

Q. So the council would more or less, select a sub-committee to take charge of the police function; is that correct? A. Yes.

Q. And, the Mayor is ex-officio member of this committee? A. That is correct.

Q. Now, you told us how an applicant filed his application and what the committee would do with the application. Would you tell us whether or not you had any standards or criterion that you would apply to an application? A. No. Like a job description—you mean—or something like that?

Q. That's right. Qualifications—what are you looking for? A. Just try to pick out the best man.

Q. In other words, you sort of eyeball him and— A. Use our own judgment.

Q. In other words, you didn't have any educational qualifications as such? A. None set out.

[355] Q. No experience as such? A. No.

Q. What about a medical standard? A. None.

Q. No medical standards as such? A. Well,—now, such a question is asked on his application blank—now, if they told the truth or answered a question like that on their application form—why then we certainly wouldn't try to employ a man that was without a leg or one arm—or something like that—if we knew it.

Q. What about his I.Q.? Did you look into an applicant's I.Q.? A. Well, of course, is there's a place on there for—to list his education.

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Q. And that's the only thing that you would have to go by is the amount of schooling that he has designated? A. That's right. Probably experience. Experience is asked for on the back.

Q. Now once a person has submitted this application; what did the Council or what did the committee do to determine if the information was factual or truthful? A. Well, investigate probably with the people he gives as reference. Usually they list three as a reference—probably check with these.

Q. Other than that—anything else you can think of? [356] A. No. In most cases we know all the people pretty well. Somebody that we do not know—then we try to check them out.

Q. I would like to direct your attention to Mr. Charles Lee Ratliff. Do you recall when he was hired by the Star City Council? A. Yes. The records show that his first pay period was the last half of January in 1971.

Q. Did Mr. Ratliff submit a written application? A. Yes. He did.

Q. Do you still have that on file? A. It's in the files. Yes."

Mr. Meyerson: Continuing at page nine, line 24 to page ten, line 25.

The Court: I don't believe you called it right—continuing on page—on line 9, what page?

Mr. Meyerson: Page nine, line 24, Your Honor. Through page ten, line 25.

Q. "How long had you known Mr. Ratliff when he made application for this position? A. A very short time.

Q. Were you aware of the fact that he had moved to Star City only a short time before? A. Yes.

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[357] Q. Did you also know that he had made application for a job with the Pine Bluff Police Department? A. No. I don't believe I did.

Q. You didn't know that? A. No.

Q. So you had no knowledge that he had been rejected or not been hired? A. No.

Q. Does the application require the applicant to designate previous employment? A. Come over that again.

Q. Does the application that you mentioned—that you use—does it call for the applicant to designate prior employment? A. Yes.

Q. Did you notice the number of jobs that Mr. Ratliff had prior to coming to Star City? A. I believe there were spaces on the back for three, and I think they are all complete.

Q. They were all complete? A. Yes.

Q. Did you check with his previous employers? A. No."

Mr. Meyerson: Continuing at page twelve, line 23 through page thirteen, line 20.

[358] Q. "Did you know that Mr. Ratliff had been involved in an accident where he sustained rather serious injuries to his neck, and his back, and was in a cast from his shoulders—probably down to his buttocks for a period of some three months? A. No.

Q. In other words, you made no inquiry as to his physical or mental condition before you all accepted him for employment? A. That's correct.

Q. Is that correct? A. That is correct.

Q. Does this application form that we are talking about —that Mr. Ratliff executed—did it indicate that he had had any prior law enforcement experience? A. He had

some police training in Georgia—I believe. In the State of Georgia.

Q. Was this civilian or military? A. Military I believe. It states military training.

Q. But there's nothing about any civil experience? A. Any what?

Q. Any civil experience? A. No.

Q. Is that the only experience that he designated in the form of police work? [359] A. Yes."

Mr. Meyerson: Continuing at page thirteen, line 21 through page fifteen, line 5.

Q. "At the time Mr. Ratliff made the application—were there other applications pending at the time? A. Yes. We had two or three more. I don't recall but I'm sure we had more than just one.

Q. What consideration was given to these applications? A. Well, I don't recall that any of them were interviewed. We looked their applications over and decided on—to interview Mr. Ratliff. I don't think we interviewed any of the others that I recall.

Q. Could you tell us what factor in Mr. Ratliff's application persuaded you to select him for an interview as against the others who had made application? A. His training I think.

Q. His military training? A. Yes.

Q. Did his application state the amount of training he had? A. Six months.

Q. You also stated that you talked with Mr. Reed. What did Mr. Reed have to say about Mr. Ratliff? A. Mr. Reed —I have known Mr. Reed a long time, and usually I call him when his name shows up on an application as a reference,

and he is very—sometimes he don't [360] definitely recommend a person—sometimes he will and sometimes he won't. That's the way he has done to me and I don't recall that he did definitely recommend Mr. Ratliff as being a good prospect, and I don't recall that he said he wouldn't. I took it that he thought he would be all right.

Q. Did you ask Mr. Reed how long he had known Mr. Ratliff and what he based whatever he said on? A. No. I don't recall that I did.

Q. Is this the same Mr. Reed who was forced to resign from the Pine Bluff Police Department? A. Yes.

Q. Just a short while ago? A. Yes.

Q. And, he said nothing at all to you about Mr. Ratliff having made application for employment with the Pine Bluff Police Department? A. No."

Mr. Meyerson: Your Honor, that concludes the reading of the portions of Mr. Thomasson's testimony.

The Court: Very well. They will be filed, if not already with the record.

This may be a good time to take a break. Would the jury like to take advantage of this

Appendix F

[322] "Q. Were you discharged for physical or mental reasons? A. Physical.

Q. What was the nature? What was wrong with you, physically? A. I had my neck broke, and I couldn't turn my head."

Mr. Meyerson: Continuing at page twenty-one, line 18 through page twenty-two, line 5.

"Q. What is your educational background, Mr. Ratliff?"

Mr. Smith: Excuse me. What page is that?

Mr. Meyerson: Page twenty-one, line 18.

"A. Well, quite a bit.

Q. Can you give me what your educational background is?

Where did you go to elementary school? A. I went to Shiloh, Mississippi.

Q. And, did you graduate from high school? A. No.

Q. What grade did you go through? A. I went to the tenth grade, and went in service after that.

Q. Did you finish your high school degree in service? A. No.

Q. Do you have a high school diploma of any sort? A. No."

Mr. Meyerson: Continuing at page twenty-four, line 6 to page twenty-seven, line 11.

"Q. Did you take an examination with the civil service for [323] the Pine Bluff Police Department? A. Yes.

Q. When was that? A. When I filed my application there.

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Q. And, when did you file your application? A. 1970.

Q. And that I assume, would be on record with the Pine Bluff Police Department? A. Probably. I don't know.

Q. You say that you never received any notification, either from the civil service Commission or from the Pine Bluff Police Department saying—'You are hired' or "you were rejected?" A. No.

Q. Do you know if you passed the civil service test? A. No. I don't know.

Q. How did you learn about the position in Star City for which you were hired? A. Through the man that was quitting.

Q. Who was that individual? A. Joe Scarlett.

Q. And, does he live in Star City? A. He is dead.

Q. He is deceased. And, when you heard about the position, did you put in an application with the Star City Police [324] Department? A. Yes.

Q. Did you have a test? A Civil Service test? A. No.

Q. Did you have an interview for the position? A. Yes, sir.

Q. Who were you interviewed by? A. Lynn Thomasson.

Q. And he was then Mayor of the City? A. Yes.

Q. And, do you recall off hand when that interview was held? Was it prior to January, 1971? A. Yes. About December—probably.

Q. And, you went down—do you recall off hand if he asked you any questions during the interview? A. He asked me questions. I don't recall what they were.

Q. Do you recall if he asked you anything about your educational background. A. I don't recall whether he asked.

Q. Do you recall if he asked you anything about your previous law enforcement experience? A. No. I don't.

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Q. Did he ask you anything about your physical or mental health? A. I don't recall any of the questions he asked me. Also, [325] I believe I went before the Council down there, but I don't recall what their questions might have been there either.

Q. But, you do recall that the Council members may have asked you questions? A. I was before the council.

Q. Do you know if they sought any references? Did they ask for any references? A. I think I furnished references.

Q. What references do you recall off hand furnishing? From what places? A. I had notarized references.

Q. From where? A. From a Judge and the state police out of Mississippi.

Q. Did you submit those references with your application or after your application? A. I had them. I don't have them now. I believe I submitted them—

Q. To the Mayor? A. To the Chief of Police maybe.

Q. Who was the chief of police in January 1971? A. DeJarnette. Bobby DeJarnette.

Q. Do you know off hand when he ceased to be police chief? A. The first day of May 1971.

Q. May 1, 1971? [326] A. Yes.

Q. When were you hired as a policeman for Star City, what capacity were you hired as, patrolman? A. Just a policeman.

Q. You weren't hired as a chief of police? A. No.

Q. Did you ever become acting police chief? A. I was by myself. I was just the police.

Q. Did you consider yourself to be kind of in charge of the office once Officer DeJarnette resigned? A. I had to be, I guess, I was—the only one."

Mr. Meyerson: Continuing on page twenty-eight, line 19 through page twenty-eight, line 21.

Appendix F

"Q. Now, did you have any training sessions with the Star City Police Department prior to assuming your position on January 16th, 1971? A. Other than showing me the duties—None."

Mr. Meyerson: Continuing at page thirty, line 4 through page thirty, line 6.

"Q. Was that usual procedure when you were on the police force to carry a billy club or slapper with you when you got out? A. A slapper when I got out of the car."

Mr. Meyerson: Page thirty, line 7 through page thirty-one, line 5.

Appendix G

[387] A. I don't recall that. But, I did pick up oxygen at my office.

Mr. Ratliff: Thank you. That's all, Your Honor.
Mr. Howard: Nothing further.
The Court: You may stand aside.

(Witness excused)

The Court: Call your next witness.
Mr. Meyerson: Bobby Lewis McGriff.

Bobby Lewis McGriff being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Meyerson:

Q. State your name for the Judge and jury? A. Bobby Lewis McGriff.

Q. And, where do you presently reside, Mr. McGriff. A. Star City.

Q. And, how long have you lived there? A. Oh, off and on—all my life.

Q. How old are you? A. I'm forty-one.

Q. What is your marital status? A. I'm married.

Q. Do you have children? [388] A. Yes, sir.

Q. How many? A. I have two.

Q. And, what is your present employment? A. I'm a carpenter.

Q. And, are you self-employed or— A. No, sir. I work through the union hall. Commercial work.

Q. Now, in March of 1971, did you report to any member of the City Council of Star City, Arkansas, about an encounter which you had with the defendant in this law suit, Charles Lee Ratliff? A. Yes, sir. I did.

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Q. Who was the Councilman? A. Bill Frizell.

Q. And, when was that? A. That was—sometime in the early part of that year—right after that incident.

Q. And, what did you tell him? A. I told Mr. Frizell that some—that if they don't rule Mr. Ratliff on police—in the police department that he was going to hurt somebody.

Q. And, what did he tell you? A. He told me that he didn't have any power to do anything. It was up to the Mayor.

Q. And, why did you report that—why did you tell that to [389] the Councilman? A. Well, before that I had two—Mr. Ratliff had stopped me, and gave me a ticket for speeding. And, I went back and talked to him,—and tried to talk to him about it, and he got very smart about it. And, I went to see the Mayor about it, and the Chief of Police. And, so—a few days after that he stopped me again. He carried me to jail for drunk driving—he ran a test on me—I was not drinking, and he charged me with speeding. And, at that time he sprayed me in the face with mace. He hit me with his fist, and after he got me to the jail, and, removed the contents of my pocket, he reached back and put his hand on his gun, and asked me—did I want to try it.

Q. Have you ever been convicted of any crimes? A. No, sir.

Mr. Meyerson: No further questions.

Cross Examination by Mr. Carter:

Q. You've been convicted of speeding violations, or traffic violations; haven't you? A. Yes, sir.

Q. And, I believe that this DWI that you were talking

about—you were found guilty in Municipal Court of this DWI;

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[394] Q. Yes, sir? A. Did I write you a ticket?
Q. No, sir. You didn't do that.

The Court: Gentlemen, the Court has cautioned you now. You know how to ask questions don't you, Mr. Ratliff.

Mr. Ratliff: Yes, sir.

The Court: If not the Court will help you. And, you answer the questions.

•

Q. But, you are saying that you didn't stop me for speeding? A. I went up there to ask you about the ticket—about the speeding ticket I had—Yes, sir.

Mr. Ratliff: That's all.

The Court: You may stand aside.

(Witness excused)

Mr. Meyerson: May we have one minute, Your Honor.

The Court: Very well.

Mr. Meyerson: Call Marvin Thompson.

Marvin Thompson being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Meyerson:

Q. Mr. Thompson, will you state your name for the record? [395] A. Marvin Thompson.

Q. And, where do you live, sir? A. Star City.

Q. And, how long have you lived there? A. All my life.

Q. And, how old are you? A. Forty-eight.

Q. And, what is your occupation? A. I'm self-employed.

Q. What work do you do? As a self-employed individual? A. Cattle farm.

Q. And, what is your marital status? A. Yes, sir.

Q. Are you married? A. Yes, sir.

Q. Do you have children? A. No, sir.

Q. Now, in early 1971, did you complain to the Mayor or any members of the City Council of Star City about the conduct of Charles Lee Ratliff? A. Well, not particularly him—I did about some of the cops that was at Star City along about that time.

Q. And, did that include Mr. Ratliff, sir? A. Yes, sir. I imagine it did.

Q. Who did you complain to? In particular? [396] A. Well, no one in particular.

Q. Well, did you appear at a council meeting? A. No, sir. Not at that time. That was before then when I appeared at a council meeting.

Q. When was that? A. Oh,—I'd say a year before that.

Q. Did you ever advise any member of the City Council that you felt that Mr. Ratliff would not—would cause some injury if they didn't remove him? A. No, sir. Not a City Councilman—No, sir.

Q. The Mayor? A. No, sir.

Q. Who did you tell then? A. Well, just friends, and shop talk—you know. That's the only thing.

Q. You did tell that to some people? A. Well, not especially about him.

Q. Do you know Mr. Royce Henderson? A. Yes, sir. I've met him.

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Q. And, your testimony now today is—that you never did complain to the Star City City Council about the conduct of Mr. Ratliff? A. No, sir. Not about Mr. Ratliff—by himself—No, sir.

Q. Well, hiw many policemen were on the police force—at the time you complained?

[397] The Court: I believe he testified that he did not complain to the Mayor or any member of the City Council.

Q. Are you employed by Mr. Frizell? A. Part-time—Yes, sir.

Q. Would that part-time be about ninety percent of your income? A. Well, I wouldn't know about that.

Q. Well, how much of your income comes from Mr. Frizell? A. I don't know.

Q. Did you tell Mr. Royce Henderson—

The Court: Now, Mr. Meyerson, this is your witness.

Mr. Meyerson: Yes, Your Honor. And, I might—if I could explain it. Perhaps we should approach the bench.

The Court: I don't think it's necessary.

Mr. Meyerson: Then I will explain then—I believe that the witness is changing his testimony—

The Court: Now, that's what the Court is trying to suggest to you, Mr. Meyerson. You are not permitted to impeach your own witness.

Mr. Meyerson: In fact, he's become a hostile witness, Your Honor, and I would request—

The Court: You didn't call him as a hostile [398] witness.

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Mr. Meyerson: But, a witness can become hostile on the stand, and because of that I would request the opportunity to delve into the matter.

The Court: Well, you may examine the witness under the Rule, as a hostile witness—but, he is still your witness, and you know the Rule with reference to that. This party has testified that he has not discussed it with any member of the City Council or the Mayor. I think that's the crux of his testimony—what you're trying to show.

Mr. Meyerson: That's correct.

The Court: And, I appreciate your situation—the one you're in, but that's it.

Mr. Meyerson: All right.

Q. What exactly did you tell the City Councilmen about the policemen that you were talking to them about? A. Well, at one time there was about thirteen people up there with grievances, and I told them that they ought to do something about the way the situation was. And, they fired some men. I don't remember who now—but, they did.

Q. When was that? A. About a year prior to what we are talking about.

[399] Q. Right. And, as I recall you told me about early 1971—you did complain generally again about the police department? A. Yes, sir. I said something about the way the situation was.

Q. Who did you say this to? A. I don't remember.

Q. Well, was it Mr. Thomasson by any chance—the Mayor? A. No, sir. It wasn't the Mayor. I hardly ever talk to the Mayor.

Q. Was it Mr. Frizell? A. Mr. Frizell?

Q. Hum-huh. A. No, sir. Don't—

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Q. You know who Mr. Frizell is? A. You talking about the one in town?

Q. That's correct? A. No, sir. It wasn't him.

Q. Was it Mr. Bush—Mr. Smith— A. I don't know a Mr. Bush.

Q. Well, what did you tell whoever it was?

The Court: Well, I don't think that would be proper, Mr. Meyerson now—

Mr. Meyerson: Your Honor—I'm sorry—

The Court: unless you can—

[400] Mr. Meyerson: —about the conduct of the policemen?

The Court: Well, that would not be proper either. Because—what did you tell whoever it was. You've got to identify them.

Mr. Meyerson: That's what I'm trying to do Your Honor.

The Court: Well, if it isn't one of these parties, it would not be proper.

Q. Did you complain to the City Council in the early part of 1971? A. No, sir.

Mr. Meyerson: I don't believe I have any further questions.

Cross Examination by Mr. Carter:

Q. Mr. Thompson, I think the incident that you—or that Mr. Meyerson was referring—referred to an officer who use to work for the City of Star City; is it not? A. Yes, sir.

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Q. And, also—the man was Mr. Lloyd Hawkins; is that not true? A. Yes, sir.

Q. Is this not the individual that you mentioned that the City let go—or at least he ceased to be a policeman for

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[402] Mr. Meyerson: Your Honor, might we have a minute or two to discuss a situation in view of what has occurred on the witness stand—something that we didn't expect.

The Court: To discuss it among yourselves, you mean—

Mr. Meyerson: Yes, sir.

The Court: Very well.

Mr. Meyerson: Your Honor, call Mr. William Thomasson.

William Thomasson being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Meyerson:

Q. Would you state your name for the record please? A. William Oliver Thomasson.

Q. Where do you reside? A. 330 South Honda in Monticello, Arkansas.

Q. How long have you resided there? A. I've been at that location for about four years.

Q. And, by whom are you employed? A. I'm employed by Burlington Industries.

Q. What is the position that you hold? [403] A. Laboratory manager.

Q. And, how long have you held this position, sir? A. For seven years.

Q. What is your educational background? A. Well, I have a BS degree in chemistry from UABP.

Q. Did you ever have an encounter with Charles Lee Ratliff? A. Yes. I did. Back in February 1971.

Q. Did you appear in the Municipal Court of Star City, Arkansas, as a consequence of that? A. Yes. I did.

Q. Did you report the substance of the encounter to the presiding officer at the Municipal Court? A. To the Mayor —Yes. I did.

Q. And, approximately how long after the encounter did you appear in Court? A. I think it was within a week.

Q. Were there other persons present when you were in court? A. There was the Municipal Judge—who was the Mayor, Chief of Police, and Mr. Ratliff.

Q. And, what did you report? What did you tell them? A. I was charged by Mr. Ratliff with drinking and driving, and resisting arrest. And, which case I told the Judge that I was not guilty.

Q. And, did you explain to him—or tell him what you thought was improper conduct on the part of Mr. Ratliff? [404] A. Yes. I did.

Q. What did you tell them? A. Well, I told him that—Mr. Ratliff after stopping me, had asked me why did I have my hands in my pocket. He said, "You must have a knife in there." And, I told him that "As a matter of fact, I do have one in there." He said, "Take it out." I took the knife out—gave it to the officer—he looked at it—gave it back to me, and told me to keep your hands out of your pocket. He then told me to stand in front of the car with my hands placed down on the hood, while he went to the car and called the State Police Headquarters—I believe to take the car out. I was out there for a period of about seven—eight minutes, at most. At least—I'm sure with my hands on the car—and, it was cold. When the

officer came back, inadvertently I put my hands back—I reached up—got up off the car, put my hands in my pocket, at which time he drew his revolver, and struck me three times across the head. After this he told me to go and get in his car. I got in the car. He came and pulled me out of the car with my feet still on the floorboard of the car—placed his knee in my back, and raised my arms up behind my back, and handcuffed me. He picked me up by the handcuffs and threw me back in the car. At which time he took me to the jail—he did [405] not tell me what I was charged with at all. After striking me over the head, he did not offer me any medical attention, or anything. He just locked me up.

Q. Were you given a breathalizer or an alcohol test? A. No. I wasn't.

Q. Did you report to the Court the day you appeared? A. I did.

Q. And, were you a Burlington Mills' car that evening? A. I was. In a company car.

Q. Were you on your way back from doing company business? A. Yes. I had checked the car out for the night.

Q. Do you drive through Star City any more? A. I don't drive through Star City any more.

Q. Did you report this incident that you described in here to anybody else after this case? A. Immediately after leaving the Municipal Court that day, I attempted about seeing a lawyer to appeal the case. And, I went to Drew County—which he—he kind of did not want to take the case. He suggested that I go to Star City—and, this particular lawyer was located in the Court House there. I went up there, and I talked to him about it. And, I told him that—what had happened, and he suggested that—if I were to try to appeal the case, that the only way that

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I could win the case—since the officer and I were the only ones involved—was to [406] get the officer to perjure himself again as he did in the courtroom that day.

Q. So you did not bring a law suit then? A. I did not try to appeal the case—the lawyer told me that it would take seventy-five dollars just to start action on it.

Q. Have you ever been convicted of any felony crimes? A. No. I haven't.

Q. Have you ever been convicted of any driving offense? A. Yes. I have.

Q. What kind of offenses were those? A. I've been convicted since that time of—well, only one—DWI.

Q. Is that arising out of that incident? A. Well, I'm talking about other than that incident.

Q. Were you convicted of that incident in Municipal Court that day? A. Was I convicted for that? Yes. I was.

Q. Aside from that—you've been convicted of no felonies? A. No.

Q. Were there other persons present in the courtroom that day, when you told your story? A. Just the—just the Chief of Police, and the Mayor, whose name is Thomasson. I recognized the Chief of Police. He had a badge on his arm—other than that I don't know.

[407] Q. Mr. Ratliff was there? A. Right. Right. No clerk.

Mr. Meyerson: No further questions.

Cross Examination by Mr. Carter:

Q. Mr. Thomasson, I believe you were charged by Mr. Ratliff with DWI and resisting arrest? A. Right.

Q. And, I believe that you have testified that you were convicted on both of those charges? A. Right.

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Q. Is that correct? Didn't you forfeit a bond on those charges? A. I posted a bond—Yes. But, I was—the Judge found me guilty of the charges after we went to trial, and forfeited the bond.

Q. And, you are testifying that you did actually appear in court, and actually testified in court? A. Right.

Q. And, the Mayor holds—the Mayor was holding Municipal Court at that time—is that your testimony? A. Right.

Q. And, other than the fact that you were testifying in this criminal case of DWI case—resisting arrest case, other

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[497] and which meant that it became effective July the 2nd.

Mr. Howard: Thank you, Your Honor.

Q. Mr. Russ, before noon you testified to Judge Harris and to this jury that you had two conversations with Mr. Marvin Thompson. I'd like for you to relate to Judge Harris and to the jury what—the nature of this conversation. What did Mr. Thompson tell you on the first conversation you had with him? A. Mr. Thompson—he came over to where I was parked at—on the city parking lot in Star City. And, he was offering his sympathy by saying that he was sorry to hear of what had happened. And, saying to me that if I can help you, feel free to call on me. That he had said to some people—two or three days prior to this incident—

Mr. Carter: I object Your Honor. Unless he can identify who those people was.

Mr. Howard: Yes.

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Q. Will you identify the persons whom he— A. I don't know them. I don't know them. Because he's using it just like I'm using it now.

Q. All right. Now, let me ask you this. There was a second conversation—did he identify anybody the second time—during the second conversation? A. During the second conversation. He said that he had been [498] to the council—

Q. Now, what council is that? A. The City Council.

Q. Of what? A. Star City.

Q. All right. A. And, he had spoke to them about the condition of the city police there. And, he said that he told them that if they didn't do something about it a man would bring somebody out foot first—or him would be brought out foot first.

Q. Now, when he said the man—did he identify the person— A. Yes. He did.

Q. Who was that individual? A. Charles Ratliff.

Q. And, where did this conversation take place? A. At Mrs. Lettie Boyd's residence.

Q. And, this was the same Marvin Thompson who was in this courtroom yesterday afternoon; is that correct? A. If it was the same Marvin Thompson that was out there—outside that I seen. I was in the jury room.

Q. All right.

Mr. Howard: That's all.

Mr. Carter: No questions, Your Honor.

Mr. Howard: That's all we have of this witness, Your Honor.

Appendix H

[723] Charles Lee Ratliff resuming the witness stand, having been previously duly sworn, testified as follows:

By Mr. Smith:

Q. Mr. Ratliff at the conclusion—or in the—when the plaintiff's attorney called you as a rebuttal witness, certain questions were asked of you, concerning prior convictions. And, you were asked a series of questions, have you ever been convicted of certain offenses. And, the—Joilett and Zion Illinois were referred to in that question. Would you testify now as to what you recall of an incident—that when it happened regarding any particulars? A. Yes, sir.

Q. Mr. Smith, I recall this incident that we are speaking of. That they were speaking of that—

The Court: When was it?

A. This is back, if I recall it right, about 1952.

Q. All right. A. These charges were put against me. I stood a jury trial, and I remember that I was acquitted of all charges on that list there. I've admitted to a speeding charge to the jury. I had in mind of one that I received in Jefferson County in 1970—when I admitted to that speeding charge. These charges they have listed there is not all [724] the charges that I was charged with in 1952. If I remember correctly, I was charged with assaulting a police officer, and if I remember correctly I was convicted of that charge because I did not deny it in Court. This incident happened on a Sunday night that I had been to a movie. I recall the name of the movie. The name of the movie was The Robe. I had a friend with me. Along

about dusk or dark we went out in the country and purchased a six pack of beer. I drank one. He drank two. And, we had three empty cans—we didn't litter. We put them back in the six pack in my car. My wife was with me. And, we seen the movie—of three hours and forty minutes, and we returned home. And, when I let this man out at his house I met the police car. When I left his home, I watched him in my rear mirror—he did a U-turn about two blocks below me, and started to following me about two or three blocks away. I went on home. I got out of my car—me and my wife, and we went in the house. And, I pulled off my coat—my shirt, and somebody hit the door. And,—hollared open the door—before anybody could move they kicked my front door in, and it turned out that they were two policemen. They came in and grabbed me, and when they did this I resisted and due to the fact that I assaulted a police officer. I left my house and drove to the police station, and told them [725] what I had done. I was not carried in. But, I was charged with all these charges, and stood a jury trial, and this is the way I remember it. And, I believe I remember correct. I was convicted of assaulting a police officer. But, these people did not have that on that list.

Q. Do you recall the penalty? Do you recall the penalty that was imposed upon your conviction? A. No, sir. I paid the lawyer—I gave the lawyer three hundred dollars and he paid my fine. They have two hundred and sixteen-fifty. And, I suppose that's correct?

Q. So it was just a fine? A. Yes, sir. Just a fine.

Q. Is there anything else—do you recall any other conviction in Illinois at any time? A. There was none whatsoever.

Q. This is your record to your recollection—to the extent of any conviction in Illinois? A. Yes, sir.

Q. Do you have anything else to add—is there anything else that you— A. I've had two other speeding tickets in my time—that's my record. I got one in Nebraska, and one in Mississippi one time—for speeding.

Appendix I

[811] * * * an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.

(28)

There was in force in the State of Arkansas at the time of the occurrence a Statute which provided in relevant part:

(a) Whenever a person is arrested for any violation of this act punishable as a misdemeanor, and such person is not immediately taken before a magistrate, the arresting officer may prepare in duplicate written notice to appear in Court contained the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in Court, and if the officer is a bonded officer he may require such person to post a bail bond and give receipt therefor.

(b) The time specified to appear must be at least five days after such arrest unless the person arrested shall demand an earlier hearing.

(c) The place specified to appear must be [812] before a magistrate within the township or county to which the offense charged is alleged to have been committed and who has jurisdiction of such offense.

(d) The arrested person in order to secure release, as provided in this section, must give his written promise so to appear in Court by signing in duplicate the written notice prepared by the arresting

officer or post a bail bond as may be required by the arresting officer. The original of the notice to appear and the receipt for bail shall be retained by said officers and a copy of each delivered to the person arrested. Thereupon, said officer shall forthwith release the person arrested from custody.

This obviously refers in the Statute to that Chapter with reference to a traffic violation, that is, speeding —including speeding. A violation of this Statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

Supreme Court, U. S.
FILED
DEC 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

NO. 76-581

MRS. CARNELL RUSS, ET AL ..... *Petitioners*

VS.

CHARLES LEE RATLIFF, ET AL ..... *Respondents*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is found in Appendix C of the Petition.

JURISDICTION

The requirements for jurisdiction are adequately set forth in the Petition.

QUESTIONS PRESENTED

I.

Whether the petition for writ of certiorari should be denied as to Respondents Mayor and City Councilmen since there was no proof of negligence of any kind against them and whether the theory of negligent entrustment was not included in the pleadings of the plaintiff or was negligence on the part of the defendants, mayor, and city councilmen, proven by the plaintiffs.

II.

Whether the Circuit Court below correctly affirmed the judgment based on the jury's verdict as to the Respondent Green.

STATEMENT OF CASE

The statement of the case is adequately set forth in the Petition.

ARGUMENT

I.

The petition for writ of certiorari should be denied as to Respondents Mayor and City Councilmen since there was no proof of negligence of any kind against them. The theory of negligent entrustment was not included in the pleadings of the plaintiff nor was negligence on the part of the defendants, Mayor and City Councilmen, proven by the plaintiffs.

Since the question of respondeat superior as well as negligence has been a part of this lawsuit from the beginning it is felt that it is beneficial to discuss both theories here.

The doctrine of respondeat superior does not apply to Civil Rights cases. There are numerous authorities to this effect. The case of *Jennings v. Davis*, 476 F. 2d 1271 (1973), at Page 1273 states:

> "The doctrine of respondeat superior is not available to impose vicarious liability upon a defendant who has no personal involvement in the alleged deprivation of plaintiff's federally-protected rights."

In order for the mayor and city councilmen to be liable there must have been personal negligence on their part since they were not present and had no personal involvement and continuing at page 1275 of the *Jennings* case we find:

> "Appellants have not alleged any affirmative conduct so their claim against the appellees obviously is grounded upon nonfeasance. But no board member or the chief is alleged to have been present at this incident

or to have had the duty, opportunity, or the ability to intervene in order to prevent Noffke's alleged unreasonable search and seizure of Mrs. Jennings. And to extend the general duty of these appellees to prudently select, educate and supervise police department employees to an isolated, spontaneous incident such as this would be beyond reason."

To the same effect is *Jordan v. Kelly*, 223 F. Supp. 731 (1963) wherein we find the following at page 737:

"The rule is different however, with respect to the chief of police of a municipal police department. Even though he may be charged with the duty of selecting the members of the force, he is not responsible for their acts unless he has directed such acts to be done, or has personally cooperated in the offense, for each police officer, is, like himself, a public servant."

It has been held that even the failure to properly train, restrain, and supervise would not subject the superior officials to liability absent personal involvement. See *Sanberg v. Dailey*, 306 F. Supp. 277 (1969), at page 278 where the Court states:

"As to the individual named defendants, the complaint alleges that they were charged with the control and supervision of the John Doe officers and knew, or should have known, of the 'wrongs' committed by them. Further it charges that these named defendants, with intentional or negligent disregard of plaintiff's constitutional rights, committed one or more of a number of acts or omissions. These include failure to adequately supervise and restrain these policemen, permitting their use of lethal weapons and excessive

force, and failure to use adequate warning to plaintiff, Sanberg.

The doctrine of respondeat superior has no place under the Civil Rights Statutes, for personal involvement is contemplated. Premised on personal culpability, these statutes are aimed at those who subject others to a deprivation of their constitutional rights, rather than at the state or city which employs them or the official with ultimate authority over them in the governmental hierarchy.

Of course, supervisory personnel may be liable in damages if they personally participate in or direct the infliction of injury. Plaintiff does not charge, however, that the named defendants struck the blows, nor does he allege that they ordered the attack on plaintiff. And the courts have uniformly held that police supervisory personnel are not liable for damages to one injured by police misconduct absent direct personal participation."

This has been held to be true even where the allegations were that the mayor knew of the police officer's dangerous propensities but did not attempt to halt his course of conduct. See *Patrum v. Martin*, 292 F. Supp. 370 (1968) where the Court held:

"That the mayor knew of the police officer's dangerous propensities but did not attempt to halt his course of conduct, and in paragraph 11 that the wrongful acts were committed with the knowledge and consent of defendants, City of Greenburg, and George Huddleston, Mayor, or were thereafter approved by said defendants. These allegations, containing no definite assertion of the mayor's, personal participation in the

wrongful acts, are not sufficient to render him liable under the Civil Rights Acts."

It can readily be seen from the above authority that it was the duty of the trial court to grant the defendant, Mayor, and defendants, City Councilmen, their motion for a directed verdict since they had no liability under the Civil Rights Acts involved in this litigation.

In the very recent case of *Rizzo v. Goode*, 96 S. Ct. 598; 46 L. Ed. 2d 561 (January 21, 1976), the U. S. Supreme Court held that no complaint could be filed against the mayor or high ranking police officials unless they have been directly and personally responsible for the brutality.

Admittedly the *Rizzo* case had to do with the equitable relief of an injunction, but it is earnestly submitted that this case also impliedly, at least, holds that there would have to be personal involvement before the mayor and city council could be held liable for money damages. As a matter of fact, in the *Rizzo* case, the mayor, the city managing director, and the police commissioner were charged with conduct ranging from express authorization or encouragement of mistreatment to failure to act in a manner so as to assure that it would not recur in the future. Since the Supreme Court has held that this kind of action could not be prevented by an injunction against individuals not personally involved, it is submitted that it necessarily follows that said officials could not be held liable for money damages where they were not personally involved.

The theory of negligent entrustment was not included in the pleadings of the plaintiffs, nor was negligence on the part of the defendants mayor and city councilmen, proven by the plaintiffs.

Although the plaintiffs did allege negligence, they never did specifically plead the theory of negligent entrustment either in their original complaint nor in their amended complaint. As a matter of fact, the plaintiffs petition to amend the complaint shortly before the trial stated it was so they could include the Eighth Amendment to the Constitution of the United States and to pendent jurisdiction to include an allegation of a violation of Section 27-906 et seq. of the Statutes of Arkansas, commonly referred to as the Wrongful Death Act pursuant to Arkansas State law. The order of the trial court dated September 17, 1975, authorizing plaintiffs to amend their complaint, makes the findings that the above mentioned was the reason for the amendment. Therefore, the theory of negligent entrustment was never a part of this lawsuit.

In any case, the plaintiffs did not meet their burden of proof of negligence on the part of defendants, Mayor and City Councilmen, in any manner.

The plaintiffs' proof does not meet their own five requirements for the defendants to be held liable for negligent entrustment. One being proof *that the entrustee was incompetent, inexperienced or reckless.*

There was no proof in the record at all indicating that Ratliff was incompetent, inexperienced or reckless, unless the shooting involved in this lawsuit is so considered, and the Mayor immediately suspended him from duty when the incident involved in this lawsuit occurred and he (Ratliff), never again served as a policeman for the City of Star City. As stated, the only thing that could be construed as evidence at the time the trial court granted the motion for a directed verdict, was the one shooting incident itself. On the other hand, the record before the court indicated that the said

Ratliff had had six months of military police training, and that he had had experience as a military policeman. In other words, he had had training in the use of firearms and was not inexperienced and was not incompetent or reckless so far as the defendants, Mayor and Councilmen, knew.

The second test cited by plaintiffs is that the entrustor knew, or *had reason to know of the entrustee's condition or proclivities*. Again, there was no proof whatsoever in the record that defendants, Mayor and City Councilmen, knew, or had reason to know of anything of Ratliff's condition which would have put them on notice that this type of thing might have happened.

Appellants seem to be saying that they have created certain inferences and certain implications, and that defendants should have gone forward with the proof that these inferences and implications were not true. Of course, the law is that the plaintiffs had the burden of proving their inferences and implications which they did not do.

At the close of plaintiffs' case, at which time the court directed a verdict for defendants, Mayor and City Councilmen, the Appellants had presented only three witnesses, namely, Bobby McGriff, Marvin Thompson, and William Thomasson, for the purpose of proving that defendant, Mayor, and defendants, City Councilmen, had notice of defendant, Ratliff's propensities for violence. When their testimony is reviewed it is obvious that in fact, they had not given any notice of anything reflecting on defendant, Ratliff, to defendants, Mayor and City Councilmen. First let us examine the testimony of Bobby McGriff, the applicable part being found in Appendix, Volume II, page 388:

Line 19: "A. I told Mr. Frizzell that some — that if they don't rule Mr. Ratliff on police — in the police department that he was going to hurt somebody."

Page 391, line 4: "Q. Now, you told the Mayor that he had tried to use a gun on you? A. I could not get in to see the Mayor except the date of the trial, and I tried to talk to him. And he, wouldn't listen to me — and, that's when I appealed it to the Circuit Court. Q. But you didn't tell Mr. Frizzell that he had tried to use a pistol on you, or threatened you? A. I told Mr. Frizzell exactly what I said in this court — that I told him that the man was going to hurt somebody if they did not remove him from the police department."

Page 393, line 19: "Q. At this time, I believe I recall that you told me that you would have my badge, and you was going to the Mayor and get it at that time? A. Yes, sir. I went to see the Mayor, but I didn't get in to see him."

It is seen from the above testimony that Mr. McGriff has not told anyone of anything that would have put the Mayor or City Councilmen on notice. He specifically states that he did not get to see the Mayor, and was convicted by the Mayor, in Mayor's court, on the charges that had been filed against him. He makes a general statement of what he says he told Mr. Frizzell but he does not give any reason for the statement. Nor does he testify as to anything that he told Mr. Frizzell that would have explained, or justified, his opinion that Mr. Ratliff was going to hurt somebody. It is of particular interest that he did not tell Mr. Frizzell, by his own testimony, that Mr. Ratliff was going to injure someone with his pistol, or that he had pistol whipped anyone.

The testimony of Marvin Thompson, that the appellants had relied on so heavily did not even involve officer Ratliff, but instead another previous officer by the name of Roy Hawkins which the City Counsel had relieved of his duties upon the complaint of Mr. Thompson and other citizens.

We find Mr. Thompson's testimony in Volume II of the Appendix, the applicable part being at page 396, line 20:

"Q. And, your testimony now today, is, that you never did complain to the Star City Council about the conduct of Mr. Ratliff?

A. No, sir. Not about Mr. Ratliff."

Page 400, Line 17: "Q. Mr. Thompson, I think the incident that you — or that Mr. Meyerson was referring — referred to an officer who use to work for the City of Star City; is it not?

A. Yes, sir.

Q. And also — the man was Mr. Lloyd Hawkins; is that not true?

A. Yes, sir.

Q. Is this not the individual that you mentioned that the City let go, or at least he ceased to be a policeman for Star City?

A. Yes, sir. But I couldn't remember."

Witness, William Thomasson, has been charged with DWI and resisting arrest and had been found guilty by defendant, Mayor Lynn Thomasson, who was acting as judge of the Mayor's court. But even he testified that he never told the Mayor anything about defendant, Ratliff, except when he testified in defense of the charges against

him in the Mayor's court. In other words, he was only testifying as a defendant in a misdemeanor case and was not giving the Mayor notice of anything out of the ordinary. See page 407 of the Appendix, Volume II, line 24:

"Q. And, other than the fact that you were testifying in this criminal case of DWI — resisting arrest, other than the fact that you was telling the Mayor as judge, your side of the story, or your defense, other than that, you didn't lodge any formal complaint with him against Mr. Ratliff did you?

A. No, I didn't."

It is obvious from the above testimony, that there was not any evidence of neglect, or other negligence on the part of defendants, Mayor Lynn Thomasson, and members of the City Council. The burden was on the plaintiffs to prove the facts of actual knowledge and acquiescence. See *Bracey v. Grenoble*, 494 F. 2d 566 (1974) at page 574.

II.

The Circuit Court below correctly affirmed the judgment based on the jury's verdict as to the Respondent Green.

Petitioners contend that since the Circuit Court below reversed as to the Respondent Ratliff, it would be unjust and legally erroneous to allow the jury verdict to stand as to the Respondent Green. No cases are cited in support of this argument and the respondents are aware of none.

It is submitted by the Respondent Green that no considerations are presented herein which alter the constitutional policy favoring the finality of jury verdicts. This

Court stated in *Atlantic & Gulf Stevedore v. Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962):

> "But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "

CONCLUSION

It is earnestly submitted that the petition for writ of certiorari should be denied since the Eighth Circuit Court of Appeals has committed no error.

Respectfully submitted,

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